Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

AGUSTIN SANCHEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

AGUSTIN SANCHEZ
Register Number 44031-004
P.O. Box 33
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Petitioner In Pro Se

2138?

QUESTIONS PRESENTED

1. Whether a court errs when it credits material testimony that is shown by undisputable physical evidence to be [incredible as a matter of law] and ignores the undisputed physical evidence and denies relief and a Certificate of Appealability in light of *Slack v. McDaniel*, 529 U.S. 473 (2000), and *United States v. Steele*, 178 F.3d 1230 (11th Cir. 1999)?

2. Whether the District Court erred in concluding that the difference between a sentence of 20-25 years imprisonment to a 53 year old man and life imprisonment has no Sixth Amendment significance in light of this High Court's ruling in *Glover v. United States*, 531 U.S. 198 (2001)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Augustin Sanchez, respectfully prays that a writ of certiorari issue to review whether the District Court's *denial* of Petitioner's claim that:

> "[h]is Sixth Amendment right to effective assistance of counsel was violated when counsel failed to explain that Petitioner faced life imprisonment if he rejected the government's plea offer of eleven years."

could constitutionally be based upon clearly erroneous findings of fact that are incredible as a matter of law and form the basis for the District Court and Eleventh Circuit Court of Appeals concluding petitioner failed to make a substantial showing of the denial of a constitutional right denying a Certificate of Appealability in light of *Hill v. Lockhart*, 474 U.S. 52 (1985); *Glover v. United States*, 531 U.S. 198 (2001); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); and *United States v. Steele*, 178 F.3d 1230, 1236 (11th Cir. 1999)?

OPINIONS BELOW

The Eleventh Circuit's opinion denying an expansion of Certificate of Appealability is set forth in Appendix "A" @ page A-1.

The District Court's opinion denying application for Certificate of Appealability in part is set forth in appendix "B" @ B-1 through B-3.

The District Court's "Order Adopting Magistrate Judge's Report and Recommendation and denying 28

U.S.C. §2255 Motion" is set forth in Appendix "C" @ pages C-1 through C-5.

The District Court Magistrate Judge's Report and Recommendation is set forth in Appendix "D" pages D-1 through D-24.

JURISDICTION

The Eleventh Circuit entered judgment denying Petitioner's Motion for Expanded Certificate of Appealability on November 29, 2001. This petition is timely filed within 90 days of that judgment. This Honorable Court has jurisdiction pursuant to 28 United States Code §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . . "

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

STATEMENT OF FACTS

1. A five count indictment charged Petitioner with drug importation and distribution offenses set forth in Appendix "E" pages E-1 through E-4. The first trial commenced in July 1996. On July 11, 1996, a mistrial was ordered. (Appendix "D" page D-5 paragraph 6)

2. Prior to retrial, the government offered Petitioner a plea bargain consisting of pleading guilty for a penalty of eleven years imprisonment achieved by a downward departure of six levels (3 for Acceptance of Responsibility and 3 for Safety Valve) to offense Level 32 with a Criminal History Category I. (Appendix "D" page D-6 paragraph 9)

3. Plea Negotiations were unsuccessful and Petitioner appeared for his second trial on July 30, 1996; Petitioner requested he be allowed to accept the Plea Bargain before jury selection was complete. The government asserted the plea offer was no longer available. (Appendix "D" page D-7 paragraph 12)

4. On August 6, 1996, Petitioner Sanchez was convicted on Counts 1-3 and 5, and was acquitted on Count 4. A life sentence was imposed on December 3, 1996. (Appendix "D" pages D-7 through D-8 paragraph 13).

5. Petitioner exhausted his avenues of direct appeal. See, *United States v. Sanchez*, 132 F.3d 1460 (11th Cir. 1997), *cert. denied*, 523 U.S. 1139 (1998). (Appendix "D" page D-8 paragraph 14)

6. In May 1999, Petitioner filed a motion under 28 United States Code §2255 to Vacate, set aside, or correct his sentence, claiming inter alia,

> "Defendant received ineffective assistance of counsel in the plea bargaining context of these proceedings as a consequence of trial counsel's, (1) failure to explain to the Defendant that he was facing life imprisonment under the Sentencing guidelines upon conviction, rather than twenty or so years, . . . "

See Appendix "F" page F-13 and pages F-26 through F-30.

7. In opposition to Petitioner's §2255 Motion the government submitted the Affidavits of 1). Attorney Samuel J. Rabin, Jr; 2). Attorney Manuel L. Casebielle; and 3). Jeanette Montenegro. See Appendix "G" pages G-1 through G-8.

8. On September 30, 1999, Petitioner filed the Supplemental Affidavit of Isaura Sanchez in support of his §2255 Motion. See Appendix "H" pages H-1 through H-4.

9. On November 3, 1999, an evidentiary hearing was conducted; Petitioner and the other Affiants testified essentially as set forth in their respective Affidavits. See Appendix "G" pages G-1 through G-8 and "H" pages H-1 through H-4 and "F" pages F-26 through F-30.

10. On April 28, 2000, Magistrate Judge, the Honorable Andrea M. Simonton, filed her Report and Recommendation that Petitioner's §2255 Motion be denied. See Appendix "D" pages D-1 through D-24.

11. On May 15, 2000, Petitioner's Attorney, Neil M. Schuster, filed objections to the Magistrate Judge's Report and Recommendation. See Appendix "I" pages I-1 through I-14.

12. When Petitioner received his Attorney's objections and the Magistrate Judge's Report and Recommendation, he sent a letter asking his attorney to show the Court that secretary Jeanette Montenegro didn't visit Petitioner with Attorney Rabin between trials, therefore, she couldn't have told Petitioner he faced life imprisonment as she testified and swore in her affidavit. Attaching the Bureau of Prisons Visiting Record. See Appendix "J" pages J-1 through J-8.

13. In August 2000, Petitioner's Attorney filed a Motion to Expand the Record to include the Federal Detention Center's Visiting Record to show secretary Jeanette Montenegro didn't visit the defendant between trials. See Appendix "K" pages K-1 through K-7.

14. On May 1, 2001, the District Court adopted the Magistrate Judge's Report and Recommendation and denied Petitioner's 2255 Motion. See Appendix "C" pages C-1 through C-5. Notably, the District Court found:

> "Upon a de novo review of the record, the Court adopts Magistrate Judge Simonton's credibility assessments of the witnesses that appeared before her at the evidentiary hearing, as well as her findings of fact . . . " See Appendix "C" page C-2.

The Court made this finding despite being provided the uncontroverted evidence that Jeanette Montenegro never visited the jail to see Petitioner between the first trial and the second trial; making it impossible for her to have interpreted for Attorney Rabin to Petitioner that he faced life imprisonment if he didn't accept the plea offer and

went to trial and was convicted. See Appendix "K" page K-7.

15. On July 6, 2001, Petitioner wrote a letter to Attorney Neil M. Schuster requesting he amend or supplement the request for Certificate of Appealability. See Appendix "L" pages L-1 through L-7.

16. On July 17, 2001, through Attorney Schuster, Petitioner moved the District Court for Leave to Supplement Application for Certificate of Appealability and provided the requested Supplement. See Appendix "M" pages M-1 through M-12.

17. On August 2, 2001, the District Court issued its Order granting Motion for Leave to Supplement Application for Certificate of Appealability. See Appendix "N" page N-1.

18. On August 3, 2001, the District Court granted a Certificate of Appealability on Petitioner's **Apprendi** claim, but denied a Certificate of Appealability on Petitioner's ineffective assistance of counsel claims adhering to the Magistrate Judge's factual findings despite the Jail's visiting Record contradicting such findings. See Appendix "B" pages B-1 through B-3.

19. On September 13, 2001, Petitioner filed with the Eleventh Circuit his Motion to Expand Certificate of Appealability inter alia, on the following issue:

> "Whether the Petitioner's Sixth Amendment right to effective assistance of counsel was violated as a result of trial counsel's failure to explain that Petitioner would certainly receive a life sentence if convicted under the sentencing guidelines rather than lesser punishment."

Appendix "O" page O-3.

See Appendix "O" pages O-1 through O-39.

20. On November 29, 2001, the Eleventh Circuit denied Petitioner's motion to expand his certificate of appealability because Petitioner failed to make a substantial showing of the denial of a constitutional right. See Appendix "A" @ page A-1.

REASONS FOR GRANTING THE WRIT

Petitioner Agustin Sanchez has been ordered to spend the remainder of his life in a federal prison. Sanchez could be serving eleven years in prison, if he had received effective assistance of counsel. Sanchez was denied an expanded Certificate of Appealability (COA), on the denial of his Sixth Amendment claim of ineffective assistance of counsel, by both the district court and the Eleventh Circuit Court of Appeals. The denials of the expanded COA were based upon the conclusion that Petitioner failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2). This conclusion was based on evidence that is incredible as a matter of law, and in violation of this High Court's recent decision in *Glover v. United States*, 531 U.S. 198 (2001). "Liberty and Justice for All" taught in our Pledge of Allegiance and the Fifth Amendment's Due Process Clause ensures that our courts will endeavor to find the truth and apply the law under our Constitution. When a court credits testimony that is unbelievable on its face and related to facts that the witness physically could not have possibly observed or events that could not have

possibly occurred under the law of nature, such evidence is incredible as a matter of law. When a court rejects credible and substantial evidence, and credits evidence that is incredible as a matter of law as basis for denying relief this High Court should exercise its supervisory power to ensure that a lower court's denial of relief is not based on falsehoods. In this case, the error by the District Court so far departed from the accepted and usual course of judicial proceedings, and the Eleventh Circuit sanctioned such a departure in denying the expanded Certificate of Appealability, as to call for an exercise of this Court's supervisory power.

THE CLAIM

Whether The Petitioner's Sixth Amendment Right To Effective Assistance Of Counsel Was Violated As A Result Of Trial Counsel's Failure To Explain To Petitioner That He Would Receive A Life Sentence If He Rejected The Government's Plea Offer Of Eleven Years, And Was Convicted By A Jury And Sentenced Under The Sentencing Guidelines?

ISSUES

1. Whether Petitioner had a Sixth Amendment right to be informed by trial counsel of the consequences of both accepting or rejecting the government's plea offer?

2. Whether trial counsel informed Petitioner of the consequences of rejecting the government's plea offer?

3. Does the FDC Visiting Record establish Jeanette Montenegro's testimony was incredible as a matter of law?

4. Whether the district court can ignore that fact that Jeanette Montenegro's testimony was incredible as a matter of law?

5. Whether the Magistrate Judge and District Court plainly erred in finding as a matter of law:

> "Even if Counsel has assured Sanchez he would receive sentence of 20 to 25 years after trial their performance was not deficient" (Appendix "D" pages D-9, D-13 through D-16 and Appendix "C" page C-2)

in light of this High Court's ruling in *Glover v. United States*, 531 U.S. 198 (2001)?

6. Whether Petitioner made a substantial showing of the denial of a constitutional right?

RULES

The standard of proof necessary to establish a Sixth Amendment violation where a habeas petitioner asserts ineffective assistance of counsel in connection with the determination to proceed to trial, rather than enter a guilty plea was announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), interpreted by the Eleventh Circuit to require Sanchez to establish:

> "(1) that counsel's representation fell below an objective standard of reasonableness measured by the prevailing professional norms; and

> (2) that there is a reasonable probability that, but for counsel's unprofessional performance, the outcome of the proceeding would have been different. *United States v. Gordon*, 156 F.3d 376, 379 (2d Cir. 1998); *Diaz v. United States*, 930 F.2d 832, 834-35 (11th Cir. 1991). (Appendix "D" pages D-9 through D-10 and Appendix "C" page C-2).

In the context of the decision to reject a plea offer, a defendant must establish that there was a reasonable possibility that, but for counsel's errors, he would have accepted the plea and not gone to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985); *Smith v. Singletary*, 170 F.3d 1051, 1053 (11th Cir. 1999) (Appendix "D" page D-10 and Appendix "C" page C-2).

" '[f]or testimony of a government witness to be incredible as a matter of law, it must be unbelievable on its face' and must relate to 'facts that [the witness] physically could not have possibly observed or events that could not have occurred under the laws of nature.' *United States v. Calderon*, 127 F.3d 1314, 1325 (11th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1090, 140 L.Ed.2d 146 (1998)." *United States v. Steele*, 178 F.3d 1230, 1236 (11th Cir. 1999).

"To obtain a certificate of appealability (COA), a habeas petitioner must make a substantial showing of the denial of a constitutional right, and that demonstration includes showing that reasonable jurists could debate whether, or agree that, issues presented were adequate to deserve encouragement to proceed further. 28 U.S.C.A. §2253(c)." *Slack v. McDaniel*, 529 U.S. 473, 146 L.Ed.2d 542, 120 S.Ct. ___ (2000).

ANALYSIS

1. Petitioner had a Sixth Amendment right to be informed by trial counsel of the consequences of both accepting or rejecting the government's plea offer.

In all instances where a habeas petitioner asserts ineffective assistance of counsel in connection with the determination to proceed to trial, rather than enter a guilty plea, the standard announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) and elaborated upon in *Hill v. Lockhart*, 474 U.S. 52 (1985) applies. In the context of the decision to reject a plea offer, a defendant must establish that there was a reasonable possibility that, but for counsel's errors, he would have accepted the plea and not gone to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985); *Smith v. Singletary*, 170 F.3d 1051, 1053 (11th Cir. 1999) (Appendix "D" page D-10 and Appendix "C" page C-2).

A criminal defendant's Sixth Amendment right to effective assistance of counsel applies in the sentencing context. *Moore v. Zant*, 885 F.2d 1497, 1511 (11th Cir. 1989) (Sentencing is a critical stage of the proceedings); *Backster v. Thomas*, 45 F.3d 1501, 1512-15 (11th Cir.) (Counsel ineffective when failed to investigate defendant's history or present relevant evidence at sentencing because defendant was prejudiced by this omission), *cert. denied*, 116 S.Ct. 385 (1995).

A criminal defendant can and should expect to receive from his counsel an accurate assessment of the time he faces in the event of conviction after trial as well as the likelihood of conviction. See, *Boria v. Keane*, 83 F.3d 48, 53-54 (2nd Cir.) (Defendant prejudiced when counsel

failed to advise defendant of improbability of acquittal and benefits of accepting guilty plea with reduced sentence because defendant's trial sentence was at least twice as long as plea time), *aff'd reh'g*, 90 F.3d 36 (1996). Here, defendant/petitioner Sanchez was entitled to rely upon his lawyer to properly advise him of the most likely prospective sentence upon conviction after trial, in addition to what would be the most likely result of a guilty plea. *Turner v. State of Tennessee*, 858 F.2d 1205 (6th Cir. 1988); *Johnson v. Duckworth*, 793 F.2d 898, 900-02 (7th Cir.) (A criminal defendant has the right to effective assistance of counsel in deciding whether to accept or reject the proposed plea agreement), *cert. denied*, 479 U.S. 937 (1986); *Beckham v. Wainwright*, 739 F.2d 262, 267 (5th Cir. 1981) (incompetent advice to withdraw or negotiate a guilty plea and instead stand trial violates defendant's right to effective assistance of counsel); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3rd Cir. 1982) (" . . . the decision to reject the plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches.")

2. Trial counsel failed to inform Petitioner that he faced life imprisonment upon conviction, if Petitioner rejected the government's plea offer of eleven (11) years imprisonment.

Petitioner submitted his affidavit (Appendix "F" pages F-26 through F-30) and both Petitioner and Isaura Sanchez testified at the evidentiary hearing that Attorneys Rabin and Casabielle and secretary Jeanette Montenegro advised Petitioner and his wife that petitioner faced 20-25 years imprisonment, if Petitioner rejected the

government's plea offer of eleven (11) years imprisonment, and was convicted by jury trial.

Petitioner Sanchez does not speak English, he only speaks Spanish and Attorney Rabin had to rely on Attorney Casabielle or secretary Jeanette Montenegro to translate to Petitioner. See factual findings Appendix "D" page D-4 paragraph #1.

Prior to the first trial, Rabin explained to Petitioner his offense level was 38 with the criminal history category I, which would result in a sentencing range of approximately 20-25 years. See factual findings Appendix "D" pages D-4 to D-5 paragraph 5.

After the first trial was declared a mistrial, on Wednesday, July 24, 1996, Rabin and Casbielle filed a Motion to Dismiss the indictment against Petitioner on the ground of double jeopardy. Rabin and Casbielle convinced Petitioner that such motion was necessary as to cause Petitioner to provide $15,000.00 to perfect the motion. Petitioner's belief in the motions propriety had to be based upon counsel's representations as Petitioner had no previous experience or understanding of criminal proceedings. See Factual findings: Appendix "D" page D-5 paragraph 7.

On July 26, 1996, the district court denied the double jeopardy motion, and the denial was filed with the clerk on the same day. (See Docket Sheet)

On Friday evening, July 26, 1996, defense Attorney Rabin utilizing his secretary, Jeanette Montenegro, as an interpreter, told Petitioner, in a telephone conversation, that the government had offered a plea bargain of

approximately eleven years imprisonment. Rabin urged Sanchez to accept the offer. Sanchez told Rabin that he wanted to discuss the matter in person. See factual findings: Appendix "D" pages D-5 to D-6 paragraph 8.

On Saturday, July 27, 1996 Rabin and Casabielle visited Sanchez in the Miami Federal Detention Center (FDC), and strongly and repeatedly urged him to take the plea offered by the government. They informed Sanchez that the plea offer involved a downward departure of three levels for acceptance of responsibility and three levels for the safety valve, resulting in a level of 32 and a sentencing range of from ten years to twelve and one-half years. See factual findings: Appendix "D" page D-6 paragraph 9. Therefore, the plea negotiations started at Offense Level 38 before the 6 level reduction; defense counsel had negotiated a plea bargain without contemplating enhancements for Leadership Role or obstructing justice. Otherwise the plea agreement offer would have addressed such 6 level increase. This was the plea offer presented petitioner by attorneys Rabin and Casbielle, and such offer *did not* take into consideration enhancements. If it had, the Offense Level would have begun at level 44 with a 6 level reduction for acceptance of responsibility and Safety Valve resulting in a level 38.

Since Attorney Rabin had to rely on attorney Casabielle to translate for Petitioner Sanchez, Casabielle's testimony at the November 3, 1999, evidentiary hearing is relevant:

> Q. [Section 2255 Defense Counsel]: So you don't have any specific recollection of discussing a four level sentencing adjustment, upward adjustment with Mr. Sanchez at the

time you conveyed the government's plea offer to him?

Do you recall? Do you?

A. At the time we spoke about the 11 years?

Q. Right.

A. No. I can't say that I recall today. No. I cannot say that. *United States v. Sanchez*, Transcript of §2255 Evidentiary Hearing-page 103.

Trial Counsel Rabin's Testimony with regard to whether he discussed leadership Role and Obstructing Justice enhancement adjustments doesn't contradict Petitioner's claim that defense counsel failed to advise him that he faced enhancement if convicted that would result in a life sentence:

Q. [Section 2255 Defense Counsel] So you don't remember whether you discussed role adjustment?

A. [Trial Counsel] I don't remember exactly what I said to him.

Q. And that would mean that would follow logically that you don't remember whether you discussed obstruction of justice as well with him?

A. Again, I don't recall one way or the other.

United States v. Sanchez, Transcript of §2255 Evidentiary Hearing page 84. When Sanchez asked Casabielle on Saturday, July 27, 1996, what about the motion Casabielle and Rabin said would get him out of jail and Casabielle replied that if Sanchez didn't accept the plea offer and got convicted, he would not get out of jail, *United States v.*

Sanchez, Transcript of §2255 Evidentiary Hearing page 96, 98, cannot form the basis to conclude Sanchez was provided the necessary opportunity to accept or reject the plea offer.

An attorney must inform the client of all plea offers but the client must also be provided with an informed opportunity to accept or reject these offers. *Diaz v. United States*, 930 F.2d 832, 834-35 (11th Cir. 1991). *United States v. Gaviria*, 116 F.3d 1498, 1512-13 (D.C. Cir. 1997) notes:

> "We think it quite likely that Gaviria would have accepted the plea offer. After all, fifteen to twenty-two years for a man in his mid-forties is significantly less than life imprisonment, and Gaviria himself admits that the prosecution's case against him was quite strong." *Id.*

While Attorney Rabin had no specific recollection of going over the sentencing guidelines, both he and Attorney Casabielle testified it was their custom and practice to go over the sentencing guidelines with every client. Rabin testified the first time he conveyed the details of the plea offer to Sanchez was face to face. *United States v. Sanchez*, Transcript of §2255 Evidentiary Hearing, page 80.

Secretary Jeanette Montenegro (Rabin's secretary) provided the testimony that the district court relied upon and credited to find Attorney Rabin told Petitioner that he faced a potential life sentence if convicted without accepting the government's plea offer. Montenegro was asked if she traveled to the FDC with Mr. Rabin after the mistrial and before the second trial (7/11/96 – 7/30/96) to meet with Petitioner Sanchez to discuss the plea offer, wherein she translated for Mr. Rabin that Sanchez faced a

potential life sentence if convicted. Montenegro answered unequivocally, "Yes, Sir." *United States v. Sanchez*, Transcript of §2255 Evidentiary Hearing, pages 108-9. It was Jeanette Montenegro's testimony, which the Magistrate Judge credited to conclude that Attorney Rabin advised Petitioner at the FDC that if Petitioner rejected the plea offer and was found guilty he faced a potential life sentence. See Appendix "D" pages D-5 footnote 3, D-7 footnote 4, D-8 Footnote 5.

Petitioner expanded the record to include the FDC visiting record, which showed Montenegro did not visit Petitioner at all between July 11, 1996 and July 30, 1996. Therefore it was impossible for Montenegro to observe, witness or translate the conversations she avered and testified about explaining to Petitioner that he faced a potential life sentence. (See Appendix "K" pages K-1 through K-10)

The district court ignored the FDC Visiting Record, and the undisputed physical fact that secretary Jeanette Montenegro did not visit Petitioner with Attorney Rabin between the first and second trial and, therefore, couldn't have related to Petitioner, he faced a potential life sentence as she testified. The District Court adopted the Magistrate Judge's Report and Recommendation and denied Petitioner's 2255 Motion. Appendix "C" page C-2.

> "Where undisputed physical facts are entirely inconsistent with and opposed to testimony necessary to make a case for the plaintiff, the physical facts must control." *Born v. Osendorf*, 329 F.2d 669 (8th Cir. 1964)

It is undisputed: that before the first trial Attorney Rabin told Sanchez his offense level was 38 with sentencing range of 20-25 years; that Rabin knew, based on evidence presented during the first trial, Sanchez faced a life sentence upon conviction due to leadership and obstruction of justice enhancements coupled with a base offense level of 38; that Attorney Rabin negotiated a plea bargain for Sanchez with the government which *did not* contemplate sentencing enhancements; that Attorney Rabin conveyed the plea offer of a six level reduction for Acceptance of Responsibility and Safety Valve for a level 32 sentencing range between 10 to 12½ years imprisonment; and that Petitioner was not advised that he faced a life sentence under the guidelines, with the exception that counsel has a custom and practice of reviewing the guidelines with clients.

3. Miami Federal Detention Center's visiting record establishes Jeanette Montenegro's testimony was incredible as a matter of law.

Jeanette Montenegro's testimony was unbelievable on its face and related to "facts that [the witness] physically could not have possibly observed or events that could not have possibly occurred under the laws of nature." *United States v. Steele*, 178 F.3d 1230, 1236 (11th Cir. 1999), quoting, *United States v. Calderon*, 127 F.3d 1314, 1325 (11th Cir. 1997) (internal quotation marks and citation omitted). Montenegro was asked if she traveled to the jail with Mr. Rabin after the mistrial to meet with Petitioner to discuss the plea offer. She answered unequivocally, "Yes, Sir." *United States v. Sanchez*, Transcript of §2255 Evidentiary Hearing pages 108-9. However, the FDC Miami "Visiting History" for Petitioner

while he was at the FDC in Miami does not contain Montenegro on its list of visitors for the dates between July 11, 1996 and July 30, 1996. Therefore, Montenegro clearly related events that could not have occurred before her and her testimony was incredible as matter of law. See, *United States v. Steele*, 178 F.3d at 1236 (11th Cir. 1999). See Appendix "K" pages K-7 through K-8.

4. The District Court should not be allowed to ignore the fact that Jeanette Montenegro's material testimony was incredible as a matter of law.

> "Where undisputed physical facts are entirely inconsistent with and opposed to testimony necessary to make a case for the plaintiff, the physical facts must control." *Born v. Osendorf*, 329 F.2d 669 (8th Cir. 1964).

The fact that Montenegro's testimony contradicts Petitioner's is an announced basis for rejecting his testimony. See Report and Recommendation: Appendix "D" pages D-5 note 3, D-7 note 4, D-8 note 5; Appendix "C" page C-2 (A). Since Montenegro's testimony was incredible as a matter of law and Petitioner's testimony was supported by substantial evidence, there is no sufficient basis to completely disregard Petitioner's testimony concerning exactly what his attorneys communicated to him. This is particularly true because neither of Petitioner's trial counsel had any specific recollection of discussing the BOL of 38 and enhancing adjustments. On the other hand, Petitioner had clear recollection of the same events.

Petitioner recalled Rabin visiting with him at the FDC, accompanied by an investigator, about three or four days after the mistrial in order to discuss a motion to

dismiss the indictment. Mr. Rabin testified that he had no independent recollection of specific meetings with Petitioner. *United States v. Sanchez*, Transcript of §2255 Evidentiary Hearing pages 79-80, 83-86. Although Petitioner did not correctly recall the exact date of the meeting, his Visiting History from the FDC is consistent with his testimony. It shows that Rabin and Salazar, the investigator, visited Petitioner on 14 July 1996. Transcript of §2255 Evidentiary Hearing pages 2-16, also see Visiting History: Appendix "K" page K-7. Petitioner also testified that co-trial counsel Casabielle visited him at the FDC a few days after the [double jeopardy based motion] was filed in order to discuss the likelihood of success. Transcript of §2255 Evidentiary Hearing page 24. Casabielle's recollection wasn't very clear. Transcript of §2255 Evidentiary Hearing page 94. Again, the Visiting History is consistent with Petitioner's testimony, even though Petitioner did not recall the date of the meeting with exactitude. Appendix "K" page K-7. Petitioner testified that he called Rabin's office on 27 July 1996 and discussed a plea offer with Rabin. Petitioner did not fully understand the offer and asked Rabin to come to the jail to explain it. Rabin went to the FDC the following day with Casabielle to meet with Petitioner and explain the terms of the offer. Transcript of §2255 Evidentiary Hearing pages 29-34. The Visiting History shows that both Casabielle and Rabin visited Petitioner on July 26, 1996. Appendix "K" page K-7. Petitioner's recollection and testimony concerning each and every legal visit he had between trials was subsequently and substantially corroborated by the FDC Visiting History Record secured after the Evidentiary Hearing. Further Montenegro's testimony that she

attended meetings with Petitioner ___; and explained that he faced a potential life sentence if he rejected the plea offer of eleven years never happened because the FDC Visiting History Record shows she never visited petitioner between trials.

Therefore, the district court should be required at the very least to reconcile the factual findings and judgment in light of the undisputed fact that Montenegro's testimony was incredible as a matter of law and reconsider its decision with regard to Petitioner's substantial corroborated testimony.

5. The District Court Did Not Apply The Proper Standard In Determining Whether The Advice In This Case Could Amount To Ineffective Assistance Of Counsel.

The Report and Recommendation (Appendix "D" pages D-13 through D-17) errs in concluding that a sentence of 20 to 25 years to a man in his mid-fifties is no different than a life sentence. Since "any amount of actual jail time has Sixth Amendment significance," *Glover v. United States*, 531 U.S. 198, 203 (2201)

> "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." *Id.*

This High Court in *Glover* held that the Seventh Circuit erred in attaching a new "significant" amount of jail time standard to the familiar prejudice prong of the *Strickland* test. *Glover*, 531 U.S. at 204. The Seventh Circuit affirmed a denial of a motion to correct sentence filed by a defendant who received a sentence that was excessive

by between 6 to 21 months. *Glover* claimed that it was ineffective assistance of counsel that caused him to receive the more severe sentence, but the Seventh Circuit affirmed the denial of the motion because, in its view, 6 to 21 months was not significant enough to constitute prejudice in order to establish ineffective assistance. This Supreme Court rejected the reasoning noting: "We hold that the Seventh Circuit erred in engrafting this additional requirement onto the prejudice branch of the *Strickland* test." *Glover*, 531 U.S. at 204.

Petitioner based his ineffective assistance of counsel claim on his counsel's failure to adequately inform him of the sentence he was facing if convicted after trial. Petitioner put forth evidence showing it should have been abundantly clear to his attorneys he would receive life in prison if he went to trial. Petitioner's trial attorneys claim they advised him he was facing 20-25 years based on his base offense level of 38. As a result Petitioner was only able to weigh the plea offer against that far lesser sentence and not against a life sentence. Had Petitioner known that he was to receive a life sentence, he would have accepted the plea offer of eleven years, which is shown by Petitioner's desire to have Rabin come to the FDC jail and explain the plea offer and his later request to accept the plea offer during jury selection, when he was weighing the plea offer against a 20-25 year sentence.

Therefore, because of ineffective assistance of counsel, Petitioner received a life sentence instead of the 10 to 12½ year sentence he would have received if he had accepted the plea offer. According to *Glover*, Petitioner would not need to survive a 20-25 year sentence by more than a day in order to have established prejudice.

6. Petitioner Made A Substantial Showing Of The Denial Of A Constitutional Right And Deserves Encouragement To Proceed Further.

The District Court and Eleventh Circuit denied Petitioner a Certificate of Appealability on his Sixth Amendment claim that he received ineffective assistance of counsel and Petitioner prays this High Court will conclude the District Court and Eleventh Circuit erred. Petitioner requests this High Court conclude he has made "a substantial showing of the denial of a constitutional right, and that demonstration includes showing that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. 28 U.S.C. §2253(c)." *Slack v. McDaniel*, 529 U.S. 473, 146 L.Ed.2d 542, 120 S.Ct. ___ (2000).

Based on the foregoing, Petitioner respectfully moves this Honorable Court to grant certiorari, vacate the judgment below, and remand for further consideration in light of *Glover v. United States*, 531 U.S. 198 (2001) and *Slack v. McDaniel*, 529 U.S. 473 (2000).

CONCLUSION

Wherefore, Petitioner Augustin Sanchez respectfully prays that this High Court grant his Petition for Writ of Certiorari, and remand this case for further consideration in light of *Glover v. United States*, 531 U.S. 198 (2001) and *Slack v. McDaniel*, 529 U.S. 473 (2000) and/or grant any other appropriate relief.

January 24, 2002

Respectfully submitted,

AUGUSTIN SANCHEZ
Petitioner Pro Se

No. _____

In The

Supreme Court of the United States

AGUSTIN SANCHEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14745-EE

AUGUSTIN SANCHEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Nov. 29, 2001)

ORDER:

Appellant's motion to expand his certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Appellant's motion to adopt brief and record excerpts from former appeal is DENIED as MOOT.

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-1445-CIV-HIGHSMITH
[underlying Case No. 95-421-CR-NESBITT]

AUGUSTIN SANCHEZ,

Movant,

v.

UNITED STATES
OF AMERICA,

Respondent.
_____/

ORDER

(Filed August 2001)

THIS CAUSE is before the Court upon Movant Augustin Sanchez' (hereinafter "Sanchez") (1) motion for issuance of certificate of appealability and (2) supplement to motion for issuance of a certificate of appealability. For a certificate of appealability to issue, a movant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). Through his submissions, Sanchez asserts that he has made such a showing with respect to this two ineffective assistance of counsel claims. The Court does not agree; however, the Court concludes that another issue presented in this case warrants a certificate of appealability.

Sanchez' first ineffective assistance of counsel claim is premised upon his assertion that his counsel failed to

advise him that he faced a potential life sentence if he proceeded to trial. An evidentiary hearing was held in this matter, and after considering the testimony the Magistrate Judge found that counsel had, in fact, advised Sanchez of the potential for a life sentence. Upon a subsequent de novo review of the record, the undersigned expressly adopted the Magistrate Judge's finding in that regard. *See* May 1, 2001 Or. at 2 ("[T]he Court adopts the finding [of the Magistrate Judge] that Sanchez was advised by his counsel that he faced a potential of life imprisonment if he did not accept the government's plea offer."). Hence, there is no factual basis to support Sanchez' first ineffective assistance of counsel claim. Sanchez' second ineffective assistance of counsel claim simply questions a strategic decision not to take an interlocutory appeal of the denial of his motion to dismiss the indictment on double jeopardy grounds. This type of armchair quarterbacking cannot support an ineffective assistance of counsel claim. For the foregoing reasons, Sanchez has not made a substantial showing of the denial of his Sixth Amendment right to the assistance of counsel.

In this proceeding, Sanchez also raised the issue of whether his life sentence violated the rule announced in *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348 (2000). In denying this claim, the undersigned held that *Apprendi* does not apply retroactively in 28 U.S.C. § 2255 proceedings. While the undersigned remains convinced that *Apprendi* issues may not be raised for the first time in collateral proceedings (initial or successive), reasonable jurists could differ on that issue. Accordingly, Sanchez is GRANTED ~~as~~ a certificate of appealability on the following issue:

> Whether imposition of Sanchez' life sentence without submission to a jury and without requiring proof beyond a reasonable doubt violated the rule announced in *Apprendi*, when he otherwise faced a maximum sentence of twenty years?

Sanchez' request for a certificate of appealability is denied in all other respects.

DONE AND ORDERED in Chambers at Miami, Florida, this 3 day of August, 2001.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
UNITED STATES
DISTRICT JUDGE

cc: Neil Schuster, Esq.
Richard Byrne, AUSA
Clerk's Office, Appeals Section

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-1445-CIV-HIGHSMITH
[underlying Case No. 95-421-CR-NESBITT]

AUGUSTIN SANCHEZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT & RECOMMENDATION AND DENYING 28 U.S.C. § 2255 MOTION

(Filed May 1, 2001)

THIS CAUSE is before the Court for review of United States Magistrate Judge Andrea M. Simonton's report and recommendation (the "R & R"), to which objections have been filed. Movant Augustin Sanchez's (hereinafter "Sanchez") motion pursuant to 28 U.S.C. § 2255 raises two claims of ineffective assistance of counsel. They are: (1) that Sanchez's trial counsel was ineffective in failing to advise Sanchez that he faced a life sentence if he declined the government's plea offer and proceeded to trial; and (2) that Sanchez's trial counsel was ineffective in failing to take an interlocutory appeal of the district court's denial of his motion to dismiss the indictment on the basis of double jeopardy. Magistrate Judge Simonton conducted an evidentiary hearing with regard to these two

claims. Following that hearing, Magistrate Judge Simonton accepted supplemental memoranda from the parties. The R & R advises that Sanchez's two claims of ineffective assistance of counsel should be denied. Sanchez filed timely objections to the R & R. In addition to his objections to the R & R, Sanchez has filed a supplement to his § 2255 motion, which challenges the constitutionality of his conviction and sentence in light of the Supreme Court's decision in *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348 (2000). The Court will address separately (a) the ineffective assistance of counsel claims considered by the R & R and (b) the *Apprendi* issue raised by Sanchez after the R & R was issued.

A. Ineffective Assistance of Counsel: The Court Adopts Magistrate Judge Simonton's Findings & Analysis in Their Entirety

Upon a de novo review of the record, the Court adopts Magistrate Judge Simonton's credibility assessments of the witnesses that appeared before her at the evidentiary hearing, as well as her findings of fact. Specifically, the Court adopts the finding that Sanchez was advised by his counsel that he faced a potential sentence of life imprisonment if he did not accept the government's plea offer. Moreover, having conducted a careful de novo review of the R & R, the record of the case, Sanchez's objections to the R & R, the government's response to Sanchez's objections, and the pertinent authorities, the Court concurs with Magistrate Judge Simonton's thorough analysis and legal conclusions. It is therefore ORDERED that the R & R is ADOPTED as the opinion of the Court.

B. Apprendi Does not Apply in Collateral Proceedings

As noted above, after Magistrate Judge Simonton issued the R & R, Sanchez filed a supplemental pleading raising an *Apprendi* challenge to his conviction and sentence. Therein, Sanchez asserts that the maximum sentence that could have been imposed upon him under the rule announced in *Apprendi* was twenty years, as opposed to the life term he received. The rule announced in *Apprendi* provides: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S. Ct. at 2362-63. The Supreme Court handed down the *Apprendi* decision on June 26, 2000, nearly a month after Magistrate Judge Simonton issued the R & R. Therefore, the Court will excuse Sanchez's failure to raise the issue earlier in this § 2255 proceeding.

Sanchez's *Apprendi* claim, though, is still unavailing. The Eleventh Circuit has expressly held that the rule announced in *Apprendi* does not apply retroactively in successive § 2255 proceedings. *See In re Joshua,* 224 F.3d 1281, 1283 & n.3 (11th Cir. 2000). Moreover, the Fourth and Ninth Circuits, as well as several district courts, have held that *Apprendi* does not apply retroactively in any collateral proceedings (initial or otherwise). *See, United States v. Sanders,* No. 00-6281, ___ F.3d ___, 2001 WL 369719, at *5 (4th Cir. Apr. 13, 2001) ("We agree with the Ninth Circuit and the majority of district courts that Apprendi does not apply retroactively to cases on collateral review."); *Bowen v. United States,* No. CRIM 95-21-B-H, ___ F. Supp. 2d ___, 2001 WL 263306, at *1 (D. Me. Mar. 16, 2001) ("This is a collateral attack under section

2255, and [the movant] therefore cannot pursue his *Apprendi* challenge."); *see generally, Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000) (discussing the limitations of *Apprendi*.) The undersigned deems the Eleventh Circuit's *In re Joshua* opinion to bar application of *Apprendi* in any collateral proceeding. Assuming, arguendo, that *In re Joshua* is limited to successive § 2255 motions, the undersigned adopts the reasoning of the Ninth Circuit on this issue and concludes that, under *Teague v. Lane*, 489 U.S. 288 (1989), *Apprendi* is not retroactively applicable in § 2255 cases (initial or successive). *See Jones v. Smith*, 231 F.3d 1227, 1236-38 (9th Cir. 2000) (conducting *Teague* analysis and concluding that *Apprendi* does not apply retroactively in collateral proceedings). Sanchez's *Apprendi* claim must, therefore, be DENIED.

C. Conclusion

In sum, it is ORDERED that:

(1) the R & R is ADOPTED as the opinion of the Court;

(2) Sanchez's ineffective assistance of counsel claims are DENIED;

(3) Sanchez's *Apprendi* claim raised in his supplemental pleading is DENIED;

(4) Sanchez's § 2255 motion is DENIED;

(5) any pending motions not otherwise disposed of are DENIED AS MOOT; and

(6) this case is CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 1st day of May, 2001

/s/ Shelby Highsmith
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Simonton
Richard Byrne, AUSA
Neil Schuster, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORID MIAMI DIVISION

CASE NO. 99-1445-CIV-NESBITT/SIMONTON
(95-0421-CR-NESBITT)

AUGUSTIN SANCHEZ
(Prisoner #44031004)

Movant,

v.

UNITED STATES
OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION RE: DEFENDANT SANCHEZ'S MOTION TO VACATE CONVICTION, PURSUANT TO 28 U.S.C. §2255

(Filed Apr. 28, 2000)

Presently pending before this Court is Defendant Augustin Sanchez's (hereafter Sanchez) Motion to Vacate Conviction, pursuant to 28 U.S.C. § 2255 (DE #1). This motion has been referred by the Honorable Lenore C. Nesbitt, Senior United States District Judge, to the undersigned Magistrate Judge for a report and recommendation (DE #3). The government has responded to this motion (DE #9), and Sanchez has replied (DE #14). An evidentiary hearing was held on November 4, 1999, and

supplemental Memoranda were then filed (DE ##19, 21).[1] This matter is now ripe for decision. For the reasons set forth below, the undersigned Magistrate Judge recommends that the motion be denied.

I. Background

On June 9, 1995, Sanchez and two co-defendants, Odilio Gonzalez and Lazaro Hernandez, were indicted for conspiring to import marijuana into the United States; importing marijuana into the United States; conspiracy to possess cocaine and marijuana with intent to distribute; attempted possession with intent to distribute cocaine; and possession with intent to distribute marijuana.

On August 6, 1996, Sanchez was convicted, after a jury trial, of conspiracy to import marijuana into the United States, importing marijuana into the United States, conspiracy to possess with intent to distribute cocaine and marijuana, and possession with intent to distribute marijuana, in violation of 21 U.S.C. §§ 963, 952(a), 846 and 841(a)(1).[2]

On December 3, 1996, Sanchez was sentenced to life imprisonment followed by five years of supervised release. Sanchez appealed his conviction to the United States Court of Appeals for the Eleventh Circuit. One of the issues he raised was that the trial court had erred in

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[1] The transcript of this hearing was filed, and is Docket Entry #20. References to the transcript are denominated, "DE #20 at ___."

[2] Defendant was acquitted of attempted possession with intent to distribute cocaine.

denying the Motion to Dismiss the Indictment on a theory of double jeopardy. The Eleventh Circuit affirmed his conviction and sentence without opinion on December 15, 1997. 132 F.2d 1460. Sanchez then petitioned the United States Supreme Court for a writ of certiorari, which was denied on May 26, 1998. 523 U.S. 1139, 118 S.Ct. 1844. Sanchez is currently serving his sentence.

II. The Motion to Vacate Conviction

On May 19, 1999, Sanchez filed a Motion to Vacate Conviction, pursuant to 28 U.S.C. § 2255, accompanied by a memorandum of law (DE ##1, 2). In this motion Sanchez alleges that his trial counsel had been ineffective for not seeking a stay of his trial to file an interlocutory appeal, for purposes of delay, after the trial court had denied his Motion to Dismiss the indictment on a theory of double jeopardy. Sanchez also alleges that his trial counsel was ineffective in connection with the advice given to Sanchez with respect to the government's plea offer. Specifically, Sanchez complains that, although his counsel urged him to take a plea bargain of eleven years in prison, his counsel failed to advise Sanchez that Sanchez faced a certain sentence of life imprisonment if convicted after trial, and instead allegedly advised Sanchez that Sanchez faced a sentence of between twenty and twenty-five years in prison if convicted after a trial. On November 4, 1999, an evidentiary hearing was held on the Motion.

At the evidentiary hearing, Sanchez presented his own testimony. The government presented the testimony of Sanchez's trial counsel, Samuel Rabin and Manuel

Casabielle, and of Rabin's secretary, Jeanette Montenegro. Sanchez presented rebuttal testimony from his wife, Isaura Sanchez. Sanchez's presentence report was introduced in evidence, without objection, as a court exhibit. Based upon the evidence adduced at the evidentiary hearing, upon the memoranda filed by counsel both before and after the evidentiary hearing, upon the oral arguments of counsel made at the evidentiary hearing, and upon the file of the underlying criminal case, the undersigned Magistrate Judge makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In June 1995, Sanchez was indicted and released on bond. This was Sanchez's first experience with the criminal justice system. Samuel Rabin began to represent Sanchez in June 1995, and continued the, representation through trial and sentence. Rabin does not speak Spanish and Sanchez does not speak English, so Rabin communicated with Sanchez only through an interpreter.

2. At the evidentiary hearing, Sanchez stipulated that Rabin is a prominent defense attorney in the community who enjoys a well deserved reputation for his expertise. In May 1996, Sanchez was rearrested and detained because he violated the conditions of his release.

3. In June 1996, Manuel Casabielle, who speaks Spanish, became co-counsel, and continued his representation through trial and sentence.

4. Before Sanchez's first trial, there were no serious discussions of a plea bargain because the government

made it clear that it would not offer a plea bargain unless Sanchez provided cooperation, and Sanchez did not wish to cooperate.

5. Also before the first trial, Rabin explained the sentencing guidelines to Sanchez, including potential enhancements and reductions. Rabin had explained to Sanchez that, if he were convicted after a trial, the base level for his offense would be level 38, which would result in a sentencing range of approximately of [sic] twenty to twenty-five years in prison. Rabin was aware that possible sentencing enhancements could raise Sanchez's sentence after a trial and conviction to life imprisonment. Rabin discussed with Sanchez "the fact that the guidelines were such that [Sanchez] was probably facing life [imprisonment]" (DE #20 at 65).[3]

6. On July 11, 1996, Sanchez's first trial was declared a mistrial due to the government's failure to disclose all impeachment evidence concerning Odilio Gonzalez, a former co-defendant who was testifying as a

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[3] Rabin had no specific recollection of the exact conversation with Sanchez, although he recalled the specific items specified above. He testified that he explained and reviewed the guidelines with his clients in every federal case. (DE #20 at 61-62). The fact that such guideline discussions were held was corroborated by Jeanette Montenegro, Rabin's secretary and sometime Spanish translator, who recalled that Rabin met with Sanchez and calculated the specifics of the guidelines with Sanchez, and made it clear to Sanchez that he faced the possibility of a life sentence (DE #20 at 110). The undersigned Magistrate Judge rejects the contrary hearing testimony of Sanchez.

-government witness. Rabin and Casabielle met with Sanchez and explained to him what had happened.

7. On Wednesday, July 24, 1996, Rabin and Casabielle filed a Motion to Dismiss the Indictment against Sanchez on the ground of double jeopardy, arguing that the government willfully withheld the impeachment material. Rabin and Casabielle had informed Sanchez that they were filing the motion and had discussed it with him. Sanchez believed that he had a good chance of prevailing on this motion.

8. On Friday, July 26, 1996, Rabin, utilizing his secretary, Jeannette Montenegro, as an interpreter, told Sanchez, in a telephone conversation, that the government had offered a plea bargain of approximately eleven years imprisonment. Rabin urged Sanchez to accept the offer. Sanchez told Rabin that he wanted to discuss the matter in person.

9. On Saturday, July 27, 1996, Rabin and Casabielle visited Sanchez in the Miami Federal Detention Center, and strongly and repeatedly urged him to take the plea offered by the government. They told Sanchez that the plea offer was based on a unique circumstance, that the evidence against him was very strong, and that if he did not accept the offer, he would die in jail. They informed Sanchez that the plea offer involved a downward departure of three levels for acceptance of responsibility and three levels for the safety valve, resulting in a level of 32 and a sentencing range of from ten years to twelve and one-half years. Sanchez refused to accept the plea offer, stating that he had a strong feeling that something good would happen at trial.

10. Rabin and Casabielle discussed with Sanchez the sentencing guidelines as they pertained to the plea offer. The consequences of accepting the plea offer as opposed to going to trial were discussed. Rabin told Sanchez that if he were convicted of the charges in the indictment, Sanchez "would die in jail" (DE #20 at 68). Casabielle recalled "conveying the idea unequivocally that if [Sanchez] didn't accept it and he got convicted, he would not get out of jail" (DE #20 at 96, 98). Jeanette Montenegro, Rabin's secretary, who served as a translator during Rabin's telephone conversation with Sanchez regarding the plea offer, also testified, "Mr. Rabin explained to Mr. Sanchez the possibility that he was facing life in jail (DE #20 at 107).[4]

11. On Tuesday, July 30, 1996, the trial court orally denied Sanchez's Motion to Dismiss, finding that the government's discovery violation was not intentional. Rabin considered taking an interlocutory appeal on the

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[4] Rabin did not recall specifically which adjustments he discussed with Sanchez at that time, although he did remember he mentioned enhancement based upon the possession of a weapon by a co-defendant (DE #20 at 83-84). Sanchez testified that he was never told that the guidelines, upon conviction, would require a life sentence, and that he was only advised that his offense level was 38, which carried a sentence of 20 to 25 years (DE #20 at 32-33). Sanchez repeatedly denied that Rabin had ever discussed with him the possibility of enhancements to the base offense level (DE #20 at 45). Sanchez also denied that Rabin had ever discussed with him the possibility of a life sentence (DE #20 at 46). As stated above, the undersigned rejects this testimony of Sanchez, and credits the contrary testimony of Rabin, Montenegro and Casabielle.

double jeopardy issue, but decided against it after speaking with other lawyers because there was no basis for the appeal after the trial court's ruling. Neither counsel spoke to Sanchez about the possibility of taking an interlocutory appeal from the denial.

12. Jury selection for the second trial began immediately after the trial court denied the Motion to Dismiss. During voir dire, Sanchez asked his counsel if he could still accept the plea offer. Rabin said he did not think so, but spoke to the prosecutor, who confirmed that it was too late.

13. After conviction, the government sought to enhance Sanchez's sentence with his violation of his bond conditions, his role in the conspiracy, and because his co-defendant had been in possession of a weapon. Defense counsel strenuously opposed the enhancements. At sentencing, the trial court enhanced Sanchez's sentence for his violation of his bond conditions and for his role in the conspiracy, but did not apply an enhancement for possession of a weapon by the co-defendant. Sanchez then received a sentence of life imprisonment without possibility of parole. This was the mandatory sentence under the guidelines.

14. After the trial, Rabin told Sanchez and his wife that the double jeopardy issue was a strong issue on appeal. Rabin told this to them because it was the only issue. The double jeopardy issue one of Sanchez's issues on appeal. The Eleventh Circuit Court of Appeals affirmed Sanchez's conviction without opinion, and the Supreme Court denied Sanchez's petition for certiorari.

15. The undersigned Magistrate Judge finds the testimony of Sanchez that had he been given the specific advice that under the guidelines he faced the certainty of life imprisonment upon conviction, this advice would have caused him to have accepted the plea offer prior to its expiration, is not credible, and that Sanchez was not prepared to accept the plea offer until after his Motion to Dismiss was denied and he saw the likely composition of the jury.[5]

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[5] This credibility finding is made based upon (1) the demeanor of Defendant Sanchez at the evidentiary hearing; (2) the fact that Sanchez's testimony that he was never advised of any potential sentencing enhancements and never discussed even the possibility of life imprisonment was directly contradicted by the other witnesses; (3) the fact that he had nothing to lose by testifying that he would have accepted the plea offer under the circumstances he claims since he is serving a mandatory life sentence that would not be affected by a perjury conviction; (4) the fact that his reason for declining the offer initially was an expressed statement that "he felt something good would happen at trial;" (5) the fact that his change of heart concerning acceptance of the plea occurred without Sanchez being informed of a change in the potential penalty he faced after trial; and, (6) that the difference between the advice given to Sanchez that "you will die in jail" if convicted, and the advice that Sanchez claims *should have been given*, that "the sentencing guidelines will require you to serve a term of life imprisonment if you are convicted," is not sufficiently significant to warrant such a change in position for a man of Sanchez' age. As discussed *infra.*, the undersigned Magistrate Judge would make the same finding even if the advice given was that the plea offer would result in serving an 11 years sentence rather than the 20 to 25 years required by the base offense level, since a 20 to 25-year sentence would be very close to the functional equivalent of a life sentence for a man of Sanchez's age at the time of the offer, 53 years old.

CONCLUSIONS OF LAW

Based upon the foregoing findings of facts, and for the reasons discussed more fully below, the undersigned Magistrate Judge concludes that defense counsel were not ineffective in their advice to Sanchez to accept the government's plea offer; and defense counsel were not ineffective in failing to pursue a meritless interlocutory appeal, for purposes of delay, from the trial court's denial of Sanchez's Motion to Dismiss the Indictment on a theory, of double jeopardy.

A. Defense Counsel Were Not Ineffective In Their Advice to Sanchez To Accept the Government's Plea Offer.

To prevail on his ineffective assistance of counsel argument as to the advice concerning the plea bargain, Sanchez must show that his lawyers' performance was deficient; and that he suffered prejudice as a result. Stated another way, Sanchez must establish "(1) that counsel's representation fell below an objective standard of reasonableness measured by the prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's unprofessional performance, the outcome of the proceeding would have been different." *United States v. Gordon*, 156 F.3d 376, 379 (2d Cir. 1998); *Diaz v. United States*, 930 F.2d 832, 834-35 (11th Cir. 1991). In the context of the decision to reject a plea offer, a defendant must establish that there was a reasonable possibility that, but for counsel's errors, he would have accepted the plea and not gone to trial. *Hill v Lockhart*, 474 U.S. 52 (1985); *Smith v. Singletary*, 170 F.3d 1051, 1053

(11th Cir. 1999). When analyzing ineffective assistance of counsel claims, a reviewing court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonably professional assistance. *Smith v. Singletary*, 170 F.3d at 1053.

In the context of advice given in connection with plea offers, some circuits have held that a defense attorney's inaccurate prediction of a sentence will not render his performance deficient unless the advice grossly mischaracterizes the likely outcome. *See e.g., United States v. Gordon*, 156 F.3d 376, 380 (2nd Cir. 1998); *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986) Other circuits have held that an attorney's inaccurate prediction of a sentence, standing alone, cannot demonstrate the deficiency component of an ineffective assistance of counsel claim. *United States v. Martinez*, 169 F.3d 1049, 1053 (7th Cir. 1999); *Knight v. United States*, 37 F.3d 769, 774 (1st Cir. 1994). The Eleventh Circuit has not ruled on the issue. For purposes of this opinion, the undersigned Magistrate Judge assumes that a sufficiently gross mischaracterization of the likely sentence, without more, would establish that counsel's performance was deficient.

1. When Advising Sanchez To Accept the Government's Plea Offer, Defense Counsel Correctly Told Him He Might Receive a Life Sentence After Trial.

The performance of Sanchez's counsel was not deficient when they informed him that if he did not accept the government's plea offer he would die in prison. This

advice was not a mischaracterization of the sentence Sanchez could expect to receive if he rejected the plea offer, but was a correct appraisal. Sanchez's counsel were correct that there was a *possibility, not* a certainty, that Sanchez would receive a life sentence if he was convicted after a trial.

Sanchez's counsel correctly informed him that the base level of 38 after his conviction would provide for a sentence of twenty to twenty-five years. They also advised him that the guidelines contained potential enhancements that could be applied to increase this sentence. The sentencing enhancements sought by the government and strongly challenged by defense counsel could have enhanced Sanchez's sentence to life imprisonment. Indeed, at sentencing, the trial court imposed two of the enhancements sought by the government, and denied the third. This increased Sanchez's level to 44, a level at which the sentencing range was mandatory life imprisonment.

Therefore, Sanchez's counsel were correct when they informed him that if he refused the government's plea bargain, he would die in prison, and Sanchez did not receive ineffective assistance of counsel as to the advice he received on the possible sentence he would receive after trial if he rejected the plea offer.

Sanchez argues that he was certain to receive a life sentence if he were convicted after trial because the requested sentencing enhancements were certain to be granted, and that his trial counsel should have known that he would have to receive a life sentence after trial, and should have advised him of that. The record does not

support Sanchez's position. While the evidence supporting the imposition of the sentencing enhancements was strong, Sanchez's trial counsel vigorously challenged them. At sentencing, the trial court imposed two of the sentencing enhancements sought by the government, and denied the third. Thus, at the time the plea offer was made, it was not certain that the sentencing enhancements would be granted after a conviction. Therefore it was not a foregone conclusion that Sanchez would receive a life sentence after conviction at trial.

Moreover, none of the cases Sanchez relies upon to support his theory is factually similar to the facts of this case. In *Esslinger v. Davis*, 44 F.3d 1515, 1530 (11th Cir. 1995), the defendant pleaded guilty based upon the advice of his counsel that the government had agreed to recommend the minimum statutory sentence, which was ten years, when in fact the minimum sentence was 99 years. In *Scott v. Wainwright*, 698 F.2d 427, 429-30 (11th Cir. 1983), defense counsel's representation was found to be ineffective where he had completely failed to prepare for trial; had persuaded the defendant, on the day of trial, to plead guilty in return for probation, which the defendant did; and the charges were legally insufficient. In *Scott*, the defendant's choice was to plead guilty or face sure conviction because his attorney was completely unprepared. Similarly, in *Kennedy v. Maggio*, 725 F.2d 269, 273 (5th Cir. 1984), defense counsel ineffectively represented his client when he incorrectly told the defendant, and the state trial judge agreed, that the death penalty was available for the crime charged, and the defendant subsequently accepted a plea bargain for life imprisonment.

Unlike the above cases, in the case at bar, Sanchez's counsel competently represented him, correctly advised him of the possible consequences if he did not accept the plea offer, and strongly and repeatedly urged him to take the plea. Sanchez's decision not to accept the plea was his own decision, and cannot be blamed on inadequate representation by his trial counsel.

2. Even If Counsel Had Assured Sanchez He Would Receive a Sentence of 20 to 25 Years After Trial, Their Performance Was Not Deficient.

Even if Sanchez's counsel had told him he would receive a sentence of 20 to 25 years in prison if he did not accept the government's plea offer, this would not have been a sufficient mischaracterization of the likely outcome as to result in deficient performance by counsel.

Sanchez was 53 years old at the time he was offered the plea. If he had accepted a plea which resulted in a sentence of 11 years, he would have been released from prison at age 64; a sentence of 20 to 25 years would have resulted in release from prison between approximately age 70 and 74¼.[6] Therefore, a sentence of twenty to twenty-five years in prison was virtually equivalent to a life sentence, and the mischaracterization, if it existed, of

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[6] The plea offer was 11 years "time in," that's, the amount of time Defendant would serve if the 15% reduction for good behavior is counted; the guideline range of twenty to twenty-five years has also been reduced by 15% for comparison purposes.

the sentence he could have expected after trial was not gross.

It is instructive to view how other courts have examined similar questions. In *United States v. Martinez*, 169 F.3d 1049, 1053 (7th Cir. 1999), the appellate court affirmed the lower court's finding that a defense attorney's performance was not deficient when he told his client that if he pled to a gun charge and a narcotics charge he would get a five year sentence which could be reduced to one year and that he would serve his sentence in a boot camp; and the client actually was not eligible for boot camp, and had to serve a five year mandatory minimum, and after the client pled guilty, he received a sentence of 157 months. The appellate court also noted that in the Seventh Circuit, an attorney's inaccurate prediction of a sentence does not demonstrate the deficiency component of an ineffective assistance of counsel claim. *Id.* at 1053. mischaracterization where: a defendant received 40 years after trial instead of the predicted 20 years, and there had been a plea offer of 20 years (*United States v. Jerome*, 124 F.3d 214, 1997 WL 579099 (9th Cir. 1997) (unpublished opinion)); a defendant received 15 years imprisonment followed by 20 years of probation after pleading guilty instead of the predicted 12 years, (*Doganiere v. United States*, 914 F.2d 165, 168 (9th Cir. 1990), *cert. denied* 499 U.S. 940 (1991)); a defendant received a 235 months sentence after pleading guilty instead of the 8 years predicted by defense counsel, who also told defendant that he would receive a 30 year sentence if convicted after trial (*United States v. Garcia*, 909 F.2d 1346, 1348 (9th Cir. 1990).

In *Gordon*, the Second Circuit affirmed the district court's finding that a defense attorney's performance was deficient when he told his client, who was offered a plea bargain of between 92 to 115 months, that his maximum exposure after trial was 120 months imprisonment when it was actually 210 to 262 months, and the client received a sentence of 210 months after conviction. 156 F.3d 380-81. In *Iaea v. Sunn*, 800 F.2d at 864-65, the Ninth Circuit found that defense counsel was ineffective when she told her client that if he did not accept the plea bargain she would remove herself from the case, and where she informed her client that he might receive probation if he pled and the likelihood of his receiving an extended or life sentence was practically non-existent, and that if he went to trial, he would get a life sentence. After pleading guilty, defendant received a life sentence. In *Chacon v. Wood*, 36 F.3d 1459, 1464 (9th Cir. 1994), the Ninth Circuit found that defense counsel's performance was deficient where he promised defendant a three month term if he pled guilty, and defendant pled guilty and subsequently received the maximum 10 year sentence. *Accord United States v. Nguyen*, 997 F.Supp. 1281, 1289-90 (C.D. Ca. 1998) (counsel's performance was deficient where he told defendant who had received a plea offer of 7 to 8 years that the maximum he could receive after trial was 10 to 11 years, defendant rejected the plea offer, and was sentenced after trial to 188 months; almost 16 years)

The undersigned Magistrate Judge is not persuaded by Sanchez's reliance on *United States v. Gaviria*, 116 F.2d 1498, 1511-13 (D.C. Cir. 1997), *cert. denied*, 118 S.Ct. 865 (1998). In *Gaviria*, defense counsel's performance was

held deficient where, after defense counsel and the trial judge wrongly misrepresented the government's plea offer as resulting in a sentencing range of 30 years to life instead of the correct range of 15 to 22 years, and defendant then refused the plea offer, defendant was convicted at trial and received a life sentence. The appellate court found that 15 to 22 years imprisonment for defendant Gaviria, a man in his mid-forties, was significantly less than life imprisonment. *Id.* at 1513.

In the instant case, defense counsels' misrepresentation, if any, was of the possible sentence after trial, not the sentence after a plea. Furthermore, the difference between 20 to 25 years and life imprisonment to Sanchez, a man in his mid-fifties, is much less than the difference between 15 to 22 years and life imprisonment to a man in his mid-forties. Therefore, even if defense counsel, in urging Sanchez to take the plea, told Sanchez he was facing a sentence of 20 to 25 years after trial, this error would not render their performance deficient.

3. Sanchez Has Failed to Establish There Was a Reasonable Possibility That, But For Counsels' Errors, He Would Have Accepted The Plea And Not Gone to Trial

Sanchez testified that if he had been advised that the guidelines required a sentence of life imprisonment, he would have accepted the plea offer in which the government agreed to recommend a sentence of approximately 11 years in prison. Based upon the testimony presented at the evidentiary hearing, the undersigned Magistrate Judge has found that Sanchez would not have accepted

the plea offer from the government during the time in which it was outstanding, even if he had been given this advice (See paragraph #15 and footnote 5 in Findings of Fact). Sanchez based his refusal to accept the plea offer on his belief that "something good would happen at trial." When he lost his Motion to Dismiss, and he had the opportunity to view jury selection, Sanchez changed his mind. This change of heart had nothing to do with the potential sentence. Therefore, even if counsels' performance were deemed to be outside the range of reasonably professional assistance, Sanchez has failed to establish the prejudice prong of his ineffective assistance of counsel claim, and he is not entitled to relief.

B. Defense Counsel Made a Reasonable Decision Not to File a Meritless Interlocutory Appeal, For Purposes of Delay, of the Denial of the Double Jeopardy Motion to Dismiss.

Sanchez also claims he was denied effective assistance of counsel in connection with the proceedings that occurred in connection with the denial of his double jeopardy based Motion to Dismiss. Specifically, he claims that defense counsels' failure to discuss with him the availability of an interlocutory appeal from this Order, and defense counsels' decision not to file such an interlocutory appeal constituted ineffective assistance of counsel. Sanchez contends that an interlocutory appeal would have given him additional time to consider the government's plea offer, and therefore, as a remedy, he seeks the opportunity to accept the plea offer.

For the reasons discussed below, the undersigned Magistrate Judge concludes that, although the better practice would have been for defense counsel to discuss with Sanchez the availability of an interlocutory appeal and the potential for a stay of the trial, the strategic decision of counsel not to pursue this course of action was not an unreasonable decision, and that Sanchez has failed to establish prejudice resulting from counsels' performance in this regard. Therefore, this decision did not represent ineffective assistance of counsel.

The United States Supreme Court recently addressed the framework for evaluating an ineffective assistance of counsel claim, where defense counsel failed to file a notice of appeal from a conviction without the defendant's consent. In *Roe v. Flores-Ortega*, 120 S. Ct. 1029 (2000), the Supreme Court held that, although it was certainly the better practice for counsel to consult with a convicted defendant regarding an appeal, the failure of counsel to do so was not per se ineffective assistance of counsel. Rather the court reiterated the longstanding rule that the decision of counsel not to consult with the defendant was constitutionally deficient only if it was "professionally unreasonable" under the totality of the circumstances. The Court held that, in the context of an appeal from a conviction, "counsel has a constitutionally-imposed duty to consult . . . when there is reason to think either (1) that a rational defendant would want to appeal . . . , or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 1031. Since *Flores-Ortega*, involved the "forfeiture of a proceeding itself," *i.e.*, review on appeal, no specific showing of prejudice would be required if

counsel's failure to consult was deficient performance; rather, the defendant would have to demonstrate only that, "but for counsel's deficient performance, he would have appealed." *Id.* at 1038.

The claim presented in the case at bar differs from the claim in *Flores-Ortega* in that Sanchez was not deprived of his right to appellate review, but was only deprived of his right to seek interlocutory appellate review. Thus, the actions of defense counsel in this case, unlike *Flores-Ortega*, did not involve the forfeiture of a judicial proceeding. To prevail on his claim that his trial counsel was ineffective because he did not seek a stay of the second trial to file an interlocutory appeal of the trial court's denial of the Motion to Dismiss based on a claim of double jeopardy, Sanchez must show that trial counsel's decision not to file an interlocutory appeal and not to seek a stay was unreasonable. *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991), *cert. denied*, 503 U.S. 952 (1992). Strategic choices made by a defense attorney must be respected if they are based on professional judgment. *Strickland v. Washington*, 466 U.S. 668, 681 (1984); *Baldwin v. Johnson*, 152 F.3d 1304, 1313 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 1350 (1999). Some factors relevant to deciding whether particular choices are reasonable are the experience of the attorney and the potential for prejudice from taking an unpursued line of defense. *Strickland v. Washington*, 466 U.S. at 681. When analyzing ineffective assistance of counsel claims, a reviewing court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonably professional assistance. *Smith v. Singletary*, 170 F.3d at 1053.

At the hearing, defense counsel Rabin testified that he did not file an interlocutory appeal from the trial court's denial of Sanchez's Motion to Dismiss claiming double jeopardy because there was no basis for an successful appeal based on the trial court's ruling, which had found that the government's misconduct which caused the mistrial was not intentional.[7] Rabin also testified that he had consulted with other lawyers on this issue and that they agreed there were no grounds for a successful appeal. The undersigned Magistrate Judge credits Rabin's testimony and finds that his decision not to take an interlocutory appeal was a reasonable strategic decision by an experienced defense lawyer. Indeed, one issue on Sanchez's appeal was this double jeopardy issue, and the Eleventh Circuit affirmed his conviction without opinion. This supports Rabin's opinion that there was no basis for a successful interlocutory appeal.[8]

Sanchez's position is that Rabin was ineffective for not filing an interlocutory appeal and seeking a stay for purposes of delay so that Sanchez would have more time to consider the government's plea offer.

In this Circuit, after a trial court denies a motion to dismiss an indictment based on double jeopardy grounds,

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[7] Casabielle testified that he deferred to Rabin on this issue.

[8] It is worth noting that jury selection commenced immediately following the trial court's decision on the Motion to Dismiss, and that pursuing an interlocutory appeal would have divided counsels' attention between the interlocutory appeal and the ongoing underlying trial. This timing is also a factor in determining whether the failure to consult was within the range of professional competence.

and the defendant files a notice of appeal, the trial court is not divested of jurisdiction to proceed with the trial if it makes written findings that the double jeopardy claim is frivolous or dilatory. The defendant then has the opportunity to seek a stay from the appellate court. *United States v. Farmer*, 923 F.2d 1557, 1561 (11th Cir. 1991), citing *United States v. Abney*, 431 U.S. 651 (1977) and *United States v. Dunbar*, 611 F.2d 985, 988 (5th Cir.) (en banc), *cert. denied*, 447 U.S. 926 (1980). If the Eleventh Circuit subsequently rejects the double jeopardy claim on the merits, the jurisdiction of the trial court with respect to the trial is affirmed. *Farmer*, 923 F.2d at 1565.

Thus, if defense counsel had filed a notice of appeal, this would not have automatically divested the trial court of jurisdiction. The trial court would have been able to retain jurisdiction if it made written findings that the double jeopardy was frivolous or for purposes of delay. *Farmer*, 923 F.2d at 1565.[9] Sanchez has provided no reason to persuade this Court that the trial court would not have retained jurisdiction where Sanchez admits the double jeopardy issue was without merit and was taken only for purposes of delay. Indeed, if the Eleventh Circuit rejects the double jeopardy claim on the merits, then the district's court's jurisdiction to try to [sic] case if [sic] automatically affirmed. *Id.* at 1565.

Moreover, the government's plea offer to Sanchez expired when the trial court denied Sanchez's Motion to Dismiss on Tuesday, July 30, 1996. It is a fair inference

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[9] Sanchez then would have been able to seek a stay from the appellate court. *Farmer*, 923 F.2d at 1565.

from the record that the reason the government extended the offer was to avert a potentially adverse ruling on the Motion to Dismiss. Once the government prevailed on the Motion to Dismiss, there is no evidence that the government would have extended the deadline for accepting the plea offer if Sanchez had taken a meritless interlocutory appeal. In fact, the government expressly refused to extend the offer during jury selection. Sanchez has suggested no other benefit he would have received as a result of delay. Therefore, even assuming that counsel's performance was constitutionally deficient in failing to consult with Sanchez concerning the interlocutory appeal decision, Sanchez has failed to establish prejudice.[10]

Thus, there is no support for Sanchez's argument that defense counsel provided ineffective assistance of counsel for not taking a meritless interlocutory appeal, for purposes of delay, of the trial court's denial of Sanchez's Motion to Dismiss alleging double jeopardy.

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[10] The usual remedy for an ineffective assistance of counsel claim based on the failure to appeal is to permit an appeal. *Martin v. United States*, 81 F.3d 1083 (11th Cir. 1996). That is why, in the context presented to the Supreme Court in *Flores-Ortega*, the focus of the prejudice inquiry was whether the defendant would have taken an appeal if counsel's performance had not been deficient. In the case at bar, this remedy would be meaningless since Sanchez appealed his conviction on this ground, and this issue was decided adversely to him by the Eleventh Circuit. Therefore, the undersigned Magistrate Judge has decided this issue based upon his claim of prejudice with respect to the plea offer.

In sum, the undersigned Magistrate Judge concludes:

1. The advice provided to Sanchez by his counsel in connection with the government's plea offer was within the range of reasonably professional assistance.

2. Sanchez has failed to establish that he suffered prejudice as a result of the claimed deficiencies of counsel in connection with the plea offer; that is, he has not established that if he had been advised that the sentencing guidelines required a life sentence he would have accepted the government's plea offer.

3. The decision of counsel not to file an interlocutory appeal of the trial court's denial of the Motion to Dismiss was a strategic decision within the range of reasonably professional assistance.

4. Sanchez has failed to establish that he suffered prejudice as a result of the failure of counsel to pursue an interlocutory appeal.

Based upon a careful review of the record, and the foregoing analysis, it is hereby

RECOMMENDED that Defendant Augustin Sanchez's Motion to Vacate Conviction, pursuant to 28 U.S.C. § 2255 (DE #1) be **DENIED**.

The parties will have ten days from the date of service of this Order within which to file written objections, if any, for consideration by The Honorable Lenore C. Nesbitt, Senior United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal any factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745 (11th Cir.), *cert. denied*, 488 U.S. 958

(1988); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE in Miami, Florida, this 28th day of April, 2000.

/s/ Andrea M. Simonton
ANDREA M. SIMONTON
UNITED STATES
MAGISTRATE JUDGE

Copies furnished to:
The Honorable Lenore C. Nesbitt
Senior United States District Judge
Neil M. Schuster, Esq.
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Miami Beach, Florida 33139
(Counsel for Movant)
U.S. Attorney's Office
Attn: Richard Byrne, AUSA
Attn: Roberta Greenspan
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Miami, Florida 33132

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA v. AGUSTIN SANCHEZ ODILIO GONZALEZ, and LAZARO HERNANDEZ, Defendants.	Case No. 95-0421 CR-NESBITT MAGISTRATE JUDGE GARBER 21 U.S.C. § 963 21 U.S.C. § 952(a) 21 U.S.C. § 846 21 U.S.C. § 841(a)(1) 18 U.S.C. § 2 INDICTMENT (Filed Jun. 9, 1995)

The Grand Jury charges that:

COUNT I

From in or about May 1994, to on or about June 2, 1995, at Miami, Dade County, in the Southern District of Florida, and elsewhere, the defendants,

AGUSTIN SANCHEZ,
ODILIO GONZALEZ,
and
LAZARO HERNANDEZ,

did knowingly and intentionally combine, conspire, confederate and agree with each other, and with other persons unknown to the Grand Jury, to import into the United States, from a place outside thereof, a Schedule I controlled substance, that is, a mixture and substance

containing a detectable amount of marihuana, in violation of Title 21, United States Code, Section 952(a), and Title 18, United States Code, Section 2; all in violation of Title 21, United States Code, Section 963.

COUNT II

On or about June 2, 1995, at Miami, Dade County, in the Southern District of Florida, and elsewhere, the defendants,

AGUSTIN SANCHEZ,
ODILIO GONZALEZ,
and
LAZARO HERNANDEZ,

did knowingly and intentionally import into the United States, from a place outside thereof, a Schedule I controlled substance, that is, a mixture and substance containing a detectable amount of marihuana, in violation of title 21, United States Code, Section 952(a), and Title 18, United States Code, Section 2.

COUNT III

From in or about May 1994, to on or about June 2, 1995, at Miami, Dade County, in the Southern District of Florida, and elsewhere, the defendants,

AGUSTIN SANCHEZ,
ODILIO GONZALEZ,
and
LAZARO HERNANDEZ,

did knowingly and intentionally combine, conspire, confederate and agree with each other, and with other persons unknown to the Grand Jury, to possess with the intent to distribute, a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, and to possess with the intent to distribute, a Schedule I controlled substance, that is, a mixture and substance containing a detectable amount of marihuana, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2; all in violation of Title 21, United States Code, Section 846.

COUNT IV

Between on or about February 2, 1995, and on or about February 13, 1995, at Miami, Dade County, in the Southern District of Florida, and elsewhere, the defendants,

AGUSTIN SANCHEZ,
ODILIO GONZALEZ,
and
LAZARO HERNANDEZ,

did knowingly and intentionally attempt to possess with the intent to distribute, a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1); all in violation [sic] Title 21, United States Code, Section 846.

COUNT V

On or about June 2, 1995, at Miami, Dade County, in the Southern District of Florida, and elsewhere, the defendants,

AGUSTIN SANCHEZ,
ODILIO GONZALEZ,
and
LAZARO HERNANDEZ,

did knowingly and intentionally possess with the intent to distribute, a Schedule I controlled substance, that is, a mixture and substance containing a detectable amount of marihuana; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ [Illegible]
FOREPERSON

/s/ Kendall Coffey
KENDALL COFFEY
UNITED STATES ATTORNEY

/s/ Richard E. Byrne
RICHARD E. BYRNE
ASSISTANT UNITED STATES ATTORNEY

APPENDIX F

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District Southern District of Florida
Name of Movant Augustin Sanchez	Prisoner No. 44031-004
Place of Confinement FCI Miami	Case No. 95-CR-41-Nesbit

UNITED STATES OF AMERICA
V.
AUGUSTIN SANCHEZ
(name under which convicted)

MOTION

1. Name and location of court which entered the judgment of conviction under attack Southern District of Florida

2. Date of judgment of conviction 12/4/96

3. Length of sentence Life Imprisonment

4. Nature of offense involved (all counts) (1) Conspiracy to Import Marijuana, in violation of 21 U.S.C. § 963; (2) Importation of Marijuana, in violation of 21 U.S.C. § 952(a); (3) Conspiracy to Possess Cocaine and Marijuana, with intent to distribute, in violation of 21 U.S.C. § 846; (4) Possession of Cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); (5) Possession of Marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1)

5. What was your plea? (Check one)
   (a) Not guilty [X]
   (b) Guilty [ ]
   (c) Nolo contendere [ ]
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
   N/A

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury [X]
   (b) Judge only [ ]

7. Did you testify at the trial?
   Yes [ ] No [X]

8. Did you appeal from the judgment of conviction?
   Yes [X] No [ ]

9. If you did appeal, answer the following:

   (a) Name of court U.S. Court of Appeals for the Eleventh Circuit

   (b) Result Denied

   (c) Date of result 1/21/98

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
    Yes [X] No [ ]

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court Supreme Court of the United States

(2) Nature of proceeding Petition for Writ of Certiorari

(3) Grounds raised Whether the Eleventh Circuit properly applied *Oregon v. Kennedy*, 456 U.S. 667 (1982) in affirming the conviction below.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [ ] No [X]

(5) Result Denied

(6) Date of result 5/26/98

(b) As to any second petition, application or motion give the same information:

(1) Name of court N/A

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [ ] No [ ]

(5) Result _____

(6) Date of result _____

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes [ ] No [ ]
(2) Second petition, etc. Yes [ ] No [ ]

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

    CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: See attached

Supporting FACTS (state *briefly* without citing cases or law) _____

B. Ground two: _____

Supporting FACTS (state *briefly* without citing cases or law) _____

C. Ground three: _____

Supporting FACTS (state *briefly* without citing cases or law) _____

D. Ground four: _____

Supporting FACTS (state *briefly* without citing cases or law) _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: Claims of ineffective assistance of

counsel are not properly raised in appellate procedure and should be presented in the context of a collateral attack upon conviction pursuant to 28 U.S.C. § 2255

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes [ ] No [X]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
    (a) At preliminary hearing N/A
    (b) At arraignment and plea Samuel Joseph Rabin, Jr., 799 Brickell Ave., Suite 606, Miami, FL 33131
    (c) At trial Samuel Joseph Rabin and Manuel Lazaro Casabielle, 815 Ponce De Leon Blvd., Suite 200, Coral Gables, FL 33134
    (d) At sentencing Samuel Joseph Rabin (address above) and Manuel Lazaro Casabielle (address above)
    (e) On appeal G. Richard Strafer, 2400 S. Dixie Hwy, Suite 200, Miami, FL 33133
    (f) In any post-conviction proceeding Pro Se before the Supreme Court
    (g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes [X] No [ ]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes [ ] No [X]

(a) If so, give name and location of court which imposed sentence to be served in the future:

_____

(b) Give date and length of the above sentence:

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes [ ] No [X]

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

/s/ [Illegible]
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on 5-11-99
(date)

/s/ Augustin Sanchez
Signature of Movant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, v. AGUSTIN SANCHEZ, Defendant. _____/	Case No. 95-CR-521-1-LCN **MEMORANDUM BRIEF IN SUPPORT OF PETITION TO VACATE SENTENCE FILED PURSUANT TO 28 U.S.C. §2255**

COMES NOW the Defendant, AUGUSTIN SANCHEZ, by and through his undersigned counsel, and hereby respectfully files this his Memorandum Brief in Support of Petition to Vacate Sentence pursuant to the provisions of 28 U.S.C. §2255. In support thereto, Defendant avers:

I. PREFACE

Although this petition is premised upon a claim of ineffective assistance of counsel, the Defendant recognizes that his trial lawyers, Samuel J. Rabin Jr. and Manny L. Casabielle merit the fine reputation which they enjoy in the legal community, based upon their years of practice before this Court and others.

However, in two particular instances, as outlined below, their representation fell below Sixth Amendment standards. This petition should not be viewed as an attack upon the very capable trial abilities of Mssrs. Rabin and Casabiele [sic]. Rather, this petition pertains to two, specific separate events which raise constitutional

questions in the context of a mistrial proceeding, complicated by matters arising under the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution.

II. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition. The Defendant's indictment charges five drug importation and distribution offenses. R1-17. The Defendant was tried twice in this case, the first of which commenced in July of 1996.

Based upon the prosecution's failure to comply with its discovery obligations as set forth in both the Standing Discovery Order and as mandated by the Due Process Clause, after days of trial, a mistrial was ordered. SR4-524.

Retrial was scheduled for the month's end. Prior thereto, plea negotiations particularly pertinent to this Section 2255 petition and, as further detailed below, were conducted.

Meanwhile, in July of 1996, the week before retrial was scheduled, Sanchez filed a motion seeking dismissal of the indictment premised upon the Double Jeopardy Clause of the Fifth Amendment. Sanchez claimed the mistrial was caused by the intentional conduct of the prosecutor. R2-141, 142. That motion was denied, premised upon the trial court's conclusion that the prosecution acted in a negligent rather than willful manner. R9-3, 4, 17 No interlocutory appeal was filed. No motion for stay was presented before the district or appellate courts.

Sanchez appeared for his second trial between July 30 and August 6, 1996. On August 6, 1996, Sanchez was convicted on Counts 1-3 and 5, and was acquitted on Count 4. The Defendant was sentenced to life imprisonment. That conviction was the subject of an unsuccessful direct appeal to the United States Court of Appeals for the Eleventh Circuit and a petition for *writ of certiorari* to the Supreme Court. This Section 2225 petition follows.

III. FACTUAL BASIS OF INDICTMENT

A. General Description of Government's Evidence. It can be fairly stated that the government's case against the Defendant was overwhelming. It involved substantial video tape and audio tape evidence establishing both the conspiracy and the substantive marijuana offenses; bribe payments to undercover law enforcement agents to release drug shipments along with their testimony; a testifying co-defendant who had no specific cooperation or leniency agreement and who was testifying premised upon the bare "hope" of Rule 35 relief in the future; the observation of numerous customs agents; and corroborating documentary evidence, including but not limited to a bill of lading for a marijuana shipment, and telephone records showing an extraordinary number of telephone calls among Sanchez and his co-conspirator.

B. Background Facts Upon Which the Conviction is Premised. This Defendant and his co-defendants, Gonzalez and Hernandez, retained the services of undercover agents of the United States Customs Service to import substantial quantities of cocaine and marijuana.

R10-42-50; Gov. Ex. 4. To further their efforts, the Defendant bribed a purported "dirty" customs inspector to locate and recover more than 573 kilograms of cocaine retrieved from a cargo container in the Port of Miami. R11-142-148; R12-20-22. The Defendant actually consigned a cargo container of marijuana to a maritime shipping company which was operated by undercover customs agents. R10-42-55, 58; Gov.Ex.28. The agent intercepted the container as it was unloaded from a cargo ship, discovered approximately twenty thousand pounds of marijuana hidden inside, and later delivered the container to the Defendant's warehouse, where other agents videotaped the unloading. R12-27-31, 47-48; Gov. Ex. 32, 33.

The Defendant's meeting at the shipping company, Coastal Freight, operated by the undercover customs agent and efforts to bribe a purported corrupt customs inspector was the subject of testimony, videotape and audio tape. The government also introduced telephone records showing Sanchez made hundreds of calls to his co-defendant during the time period encompassed within this conspiracy.

C. Plea Negotiations after Mistrial.

1. Background of Mistrial Motion and Order. The facts and circumstances surrounding the trial court's grant of the defense mistrial motion placed the prosecution team in a very uncomfortable light. Upon the defense complaints of a specific due process violation, the trial court ruled, "its clear to me that there has been a discovery violation, and a severe one, and an egregious

one . . . " SR 4-523. Specifically, the court ruled that undisclosed evidence of co-defendant Gonzalez' prior drug dealing should have been delivered to defense counsel under *Brady* as impeachment evidence. *Id.* That ruling, along with its Double Jeopardy Clause implication, was of obvious concern to the government. See *Oregon v. Kennedy*, 456 U.S. 667, 686 (1982) (Stephens J., concurring) ("The rationale for the exception to the general rule permitting retrial after a mistrial declared with the defendant's consent is illustrated by the situation in which the prosecutor commits prejudicial error with the intent to provoke a mistrial . . . [t]here is no room in the balance of competing interests for this type of manipulation of the mistrial device.") See also *Fugitt v. Lenack*, 833 F.3d 251 (11th Cir. 1987); *U.S. v. Puleo*, 817 F.2d 702, 705 (11th Cir. 1987), *cert. denied*, 484 U.S. 978 (1987). No doubt, the prosecution was also concerned with a prospective interlocutory appeal of even a favorable ruling on the expected double jeopardy claim, assuming the trial court ruled in its favor.

In *Abney v. U.S.*, the Supreme Court permitted interlocutory appeals for orders denying pretrial motions to dismiss an indictment based upon double jeopardy grounds. 431 U.S. 651 (1971). The Supreme Court recognized that "the rights conferred on a criminal accused by the Double Jeopardy Clause will be significantly undermined if appellate review double jeopardy claims were postponed until after conviction and sentence." *Id.* at 660. Needless to say, the prosecution was also concerned about postponing resolution of the Sanchez indictment.

Under these circumstances, the prosecution offered a very reasonable plea to Sanchez. By this time, co-defendant Gonzalez had already pled guilty and received a 235-month sentence, and four days of Sanchez trial had occurred. The prosecution's evidence was well known to the Defendant and his defense counsel. That evidence was devastating.

2. **Terms of Plea Offer and Information Conveyance to Sanchez.** Subsequent to the mistrial order, the prosecution purportedly offered plea agreements which would result in an imprisonment term of somewhere between 108 to 151 months. The offers were premised upon marijuana-based guideline calculations.

After telephonically describing the general terms of the plea agreements to the Defendant, defense counsel traveled to the FDC to meet with Sanchez, and reviewed the government's offer. See, Affidavit of Agustin Sanchez. However, defense counsel did not accurately recount to Sanchez the probability or possibility of receiving a life sentence under the sentencing guidelines in the event he chose to decline the prosecution's offer, try his case, and lose. See, Affidavit of Augustin Sanchez.

3. **Sentencing Proceedings.** Upon sentencing, punishment of life imprisonment was imposed. Sanchez' guideline computation reflects the following:

Base Offense Level (§2D1.1)(a)(3)(c)		38
Role Adjustment (§ 3B1.1(a))		+4
Obstruction (§3C1.1)		+2
Total Offense Level	44	

U.S. v. Sanchez, PSR, pp. 10-11.

4. Predicate of Section 2255 Proceedings. Defendant's decision to refuse the prosecution's plea offer was based, at least in substantial part, upon trial counsel's failure to describe life imprisonment as the punishment which would otherwise be imposed upon conviction. Defense counsel well recognized the extraordinary likelihood of conviction. In order to improve the Defendant's plea bargaining posture or postpone the inevitable conviction, defense counsel should have but did not seek to stay the retrial pending interlocutory appeal of the trial court's denial of the double-jeopardy based dismissal motion.

Therefore, this collateral attack is premised upon the claims that the Defendant received ineffective assistance of counsel in the plea bargaining context of these proceedings as a consequence of trial counsel's, (1) failure to explain to the Defendant that he was facing life imprisonment under the Sentencing Guidelines upon conviction, rather than twenty or so years, and (2) the failure to seek a stay of the second trial or file an interlocutory appeal to the trial court's denial of the double jeopardy motion to either improve the Defendant's plea bargaining posture or delay resolution of an otherwise extraordinarily improvident decision refusing the government's plea offer.

IV. ARGUMENT

A. Standard of Proof Necessary to Establish Sixth Amendment Violation. In all instances where a *habeas* petitioner asserts ineffective assistance of counsel in connection with the determination to proceed to trial, rather

than enter a guilty plea, the standard announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) and elaborated upon in *Hill v. Lockhart*, 474 U.S. 52 (1985) applies.

The Defendant must establish that "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59, 106 S.Ct. at 370. In other words, in this instance, "the Defendant must show that there is a reasonable probability that, but for counsel's errors, he would . . . have pleaded guilty and would [not] have insisted on going to trial." *Hill*, 474 U.S. at 59.

Strickland requires that the defendant show: (1) that counsel's representation fell below an objective standard, and (2) but for counsel's errors there is a reasonable probability that the result of the proceedings would have been different, thus prejudicing the Defendant. *Strickland*, 466 U.S. 668. To satisfy the second prong of the *Strickland* test in the context of discussing whether a guilty plea would have been entered, the Defendant must show that there is a reasonable probability that, but for counsel's errors the Defendant would not have received the sentence which was ultimately imposed. See *Yordon v. Dussen*, 909 F.2d 474 (11th Cir. 1990); *U.S. v. Ford*, 918 F.2d 1343, 1350 (8th Cir. 1990); *Turner v. State of Tennessee*, 858 F.2d 1201 (6th Cir. 1988). Given the fact that the Defendant was represented by an extremely skilled legal team, he understands that he faces a substantial burden of proof.

B. Defense Counsel was Ineffective Because He Affirmatively Misrepresented the Sentence Which the Defendant Faced Upon Conviction.

One of the most important decisions any criminal defendant must make is whether to proceed to trial or minimize one's jail exposure through the tendering of a guilty plea.

A criminal defendant has a Sixth Amendment right to effective assistance of, counsel. The right also applies in the sentencing context. *Moore v. Zant*, 885 F.2d 1497, 1511 (11th Cir. 1989) (sentencing is a critical stage of the proceedings); *Backster v. Thomas*, 45 F.3d 1501, 1512-15 (11th Cir.) (counsel ineffective when failed to investigate defendant's history or present relevant evidence at sentencing because defendant was prejudiced by this omission), *cert. denied*, 116 S. Ct. 385 (1995). As part and parcel of the right to effective assistance of counsel in the sentencing context, a criminal defendant can and should expect to receive from his counsel an accurate assessment of the time he faces in the event of conviction after trial. As well as the likelihood of conviction. A defendant can show that he was harmed by going to trial, which will satisfy the prejudice prong of ineffective assistance of counsel claim based upon misadvice. See, *Boria v. Keane*, 83 F.3d 48 53-54 (2nd Cir.) (defendant prejudiced when counsel failed to advise defendant of improbability of acquittal and benefits of accepting guilty plea with reduced sentenced [sic] because defendant's trial sentence was at least twice as long as plea time), *aff'd reh'g*, 90 F.3d 36 (1996). Here, Defendant Sanchez was entitled to rely upon his lawyer to properly advise him of the most likely

prospective sentence upon conviction after trial, in addition to what would be the most likely result of a guilty plea.

An incompetently counseled decision to forego a guilty plea and proceed to trial "appears to fall within the range of protection appropriately provided by the Sixth Amendment." *Turner v. State of Tennessee*, 858 F.2d 1205; *Johnson v. Duckworth*, 793 F.2d 898, 900-02 (7th Cir.) (a criminal defendant has the right to effective assistance of counsel in deciding whether to accept or reject the proposed plea agreement), *cert. denied*, 479 U.S. 937 (1986); *Beckham v. Wainwright*, 739 F.2d 262, 267 (5h Cir. 1981) (incompetent advice to withdraw or negotiate a guilty plea and instead stand trial violates defendant's right to effective assistance of counsel); *U.S. ex. rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3rd Cir. 1982) (" . . . the decision to reject the plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches."). Consistent with Sanchez' Sixth Amendment right to effective assistance of counsel in the context of plea negotiation proceedings, defense counsel should have specifically warned him that he would receive life imprisonment under the sentencing guidelines upon conviction. See *Risher v. U.S.*, 992 F.2d 982, 983-984 (9th Cir. 1993) ("We hold that under these circumstances, a competent lawyer would have warned Risher of the significant risk that he would be sentenced under the . . . provisions of the Guidelines. A lawyer who failed to so advise his client cannot be said to have been functioning as counsel within the meaning of the Sixth Amendment.") A lawyer

who affirmatively misrepresents the applicable sentencing provisions in the context of the Sentencing Guidelines renders ineffective assistance of counsel, since he is unaware of the significant application of the punishment provisions. See *Spriggs v. Collins*, 993 F.2d 85, 88-89 (5th Cir. 1993) ("In deciding whether such prejudice occurred, a court should consider . . . the actual amount of the sentence imposed . . . ") Here, a knowledgeable defendant (who was specifically advised by defense counsel that conviction would specifically result in a life sentence) beyond the mere likelihood of conviction, would have accepted a guilty plea. Sanchez should have been advised to compare the extraordinary likelihood of a life sentence with a guilty plea, which at worst, would have resulted in 151 months imprisonment, given the government's sentencing concession.

The Eleventh Circuit has determined that not only must an attorney inform the client of all plea offers, but the client must be provided with an informed opportunity whether to accept or reject those offers. *Diaz v. U.S.*, 930 F.2d 832, 834-5 (11th Cir. 1991). In *Diaz*, the Eleventh Circuit was confronted with the claim that counsel did not advise the Defendant, whatsoever, of the particular parameters of the government plea offer. Sanchez does not make the same claim. Rather, Sanchez claims that his counsel did not properly advise him that he was looking at life imprisonment as a near certainty if he chose to reject the government's rather generous plea offer. The Eleventh Circuit chose to reject Diaz' claim that counsel did not advise him of the plea offer because he did not "allege that but for his attorney's errors, he would have accepted the plea offer . . . " *Id.* at 835. The

reviewing court noted counsel's advice was that the plea offer was "bullshit." This showed that the lawyer did inform his client of the offer. *Id.* at 834-35. Here, as more particularized below, Sanchez claim is limited to the assertion that because defense counsel drastically underestimated the amount of time this Defendant would receive upon conviction at trial, he chose to forego a reasonable guilty plea. However, *Diaz* is equally applicable. "Counsel has an obligation to consult with his client on important decisions and to keep him informed of important developments in the course of the prosecution." *Diaz v. U.S.*, 930 F.2d at 834. Here, after defense counsel sat through four days of the first trial, he knew or should have known that not only would his client be surely convicted, but that upon conviction a life sentence would be imposed.

U.S. v. Gaviria is also particularly on point. 116 F.3d 1498, 1511-15 (D.C. Cir. 1997).

> In response to a question from the district court as to what sentence Gaviria would face if he were to accept the plea, Gaviria's attorney answered:
>
> > Mr. Gaviria, with two prior felony drug convictions, would be considered under [Section 4B1.1 of] the [Federal Sentencing] guidelines to be a career offender, which would automatically take him to a category VI under the criminal history category and, I believe in his case, at least an offense level 37, which separate from the amount of drugs involved, as I recall, would require a sentence that starts, I believe, at about 36 years and goes up.

> Tr.27 (11/17/94). When the district court responded, "360 months to life. . . . That's with the plea," defense counsel agreed: "That is with the plea. Without the plea, he faces a mandatory sentence of life." *Id.* at 27-28.

The appellate court found that defense counsel erred in his prognostication and sentencing guideline analysis. Rather, it found,

> . . . If Gaviria had accepted the Government's plea offer, his Guideline range would therefore have been 188-262 months (fifteen to twenty-two years), assuming all other contributing factors remained the same and that he received a two- or three-point downward adjustment for acceptance of responsibility. Having been advised by his lawyer that he faced thirty years to life in prison under the plea agreement, Gaviria instead rejected the offer. Following Gaviria's conviction and as required by the "three-strikes" rule of 21 U.S.C. § 841(b) (1994), the district court imposed a mandatory sentence of life imprisonment.
>
> Gaviria now argues that had counsel advised him correctly at the November 1994 status call, instead of risking life imprisonment upon conviction, he would have accepted the Government's offer and received a fifteen-to-twenty-two-year sentence.

Gaviria, 116 F.3d at 1514. Sanchez stands in remarkably similar stead.

> Gaviria's counsel should have been aware of the decision and its implications for his client. cf. *U.S. v. Day*, 969 F.2d. 39, 43 (3d Cir.1992)

> ("[F]amiliarity with the structure and basic content of the Guidelines (including the definition and implications of career offender status) has become a necessity for counsel who seek to give effective representation.").
>
> We think it quite likely that Gaviria would have accepted the plea offer. After all, fifteen to twenty-two years for a man in his mid-forties is significantly less than life imprisonment, and Gaviria himself admits that the prosecution's case against him was quite strong.

U.S. v. Gaviria, 116 F.3d 1498, 1512-13 (D.C. 1997). Sanchez stands in a remarkably similar posture. It is extremely likely that he, too, like Gaviria, would have accepted the plea offer had he known he was looking at life imprisonment as the only alternative. See Affidavit of Agustin Sanchez which notes that he would have pled had he been properly advised of the sentencing provisions. See, *Cooks v. U.S.*, 461 F.2d 530, 532 (5th Cir. 1972) ("While good faith errors of . . . counsel are normally insufficient to justify granting a motion to vacate sentence, significant misleading statements of counsel can rise to a level of denial of due process of law and result in a vitiation of the judicial proceeding because of ineffective assistance of counsel."); *U.S. v. Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997) ("Whether lawyers get the Guidelines wrong by misinterpreting the implication of a particular provision or by failing altogether to raise a potentially helpful provision . . . such drastic missteps clearly . . . amount to errors 'so serious that counsel was not functioning as guaranteed the Defendant by the Sixth Amendment.' ") (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Here failure to advise Sanchez that he would receive a life term of imprisonment under the Sentencing Guidelines in a situation where evidence of guilt was overwhelming and the trial was already previewed for four days amounts to a Sixth Amendment violation.

C. Defense Counsel was Ineffective Because He Failed to Seek a Stay of the Second Trial In Order to File an Interlocutory Appeal of the District Court's Denial of the Double Jeopardy Clause Based Dismissal Motion. The Defendant recognizes that the Supreme Court has stated, "strategic choices made after thorough investigations of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. However, unreasoned tactical strategy decisions can be construed as ineffective assistance of counsel as a matter of law. *Deluca v. Lord*, 77 F.3d 578, 590 (2nd Cir. 1996) (It was not a reasoned strategic decision for counsel to fail to pursue extreme emotional disturbance offense because there was a high probability that defense would have reduced defendant's liability from second degree murder to first degree manslaughter), *cert. denied*, 117 S.Ct. 83 (1996); *Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355, 1358 (4th Cir. 1992) (There was no cogent tactical consideration through counsel's failure to call alibi witnesses and counsel's mistake cannot be explained as "sound trial strategy"); *United States v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996) (counsel's failure to request jury instruction on self defense cannot be explained in a way as trial strategy).

In *Griffin*, the very conservative Fourth Circuit notes, "tolerance of tactical miscalculations is one thing; fabrication of tactical excuses is quite another. *Timmelman v.*

Morrison, 477 U.S. 365, 386-87 (1986) (Hindsight cannot be used to supply a reasonable reason for decision of counsel). *Griffin*, 970 F.2d at 1358.

The question of whether a decision is tactical is a question of fact. *Bundy v. Wainwright*, 808 F.2d 1410, 1419 (11th Cir. 1987). Assuming the question is answered in the affirmative, whether the tactic is reasonable is a question of law. *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). The failure to seek a stay along with an interlocutory appeal was an unreasoned strategy as well as an unreasonable tactical decision amounting to ineffective assistance of counsel. ("This tactical decision was unreasonable.") *Id.* at 1462. Here, there was absolutely no benefit to be gained by proceeding directly to trial, after the trial court denied the double jeopardy based dismissal motion.

Rather, the law applicable to this Defendant permitted seeking a stay at both the district and appellate court levels as well as filing an interlocutory appeal upon a finding that the motion is not frivolous. *Abney v. U.S.*, *supra*. This Circuit employs the concepts of dual jurisdiction with respect to a double jeopardy claim. In *U.S. v. Dunbar*, this court held that if a double jeopardy claim is "found [by the appellate court] not to have merit, jurisdiction for the trial which occurred during the [interlocutory] appeals would be affirmed." *Dunbar*, 611 F.2d 985, 989 (5th Cir.) (*en banc*), *cert. denied*, 447 U.S. 926 (1980). In *U.S. v. Farmer*, this court noted that even if the district court made written findings that a double jeopardy claim is frivolous or dilatory, the appellate court can review that finding. 923 F.2d 1557, 1565 (11th Cir. 1991). The

appellate court expedited procedures permit consideration before retrial of the district court's findings of frivolousness, i.e., the defendant may file in the appellate court an emergency motion to stay the retrial pending consideration of the interlocutory appeal." *Id.* This is the strategy that defense counsel should have employed particularly under circumstances where his client faced a "pine box" disposition; that is leaving jail in a coffin, presented by prison authorities to his family, after the service of a life sentence.

Here, defense counsel was able to extract an extraordinary plea agreement. His client refused to accept the negotiated disposition. Defense counsel was aware that proceeding to trial was suicidal and tantamount to a death sentence. Recognizing either substantial unfounded optimism voiced by the Defendant (or self-destructive obstinacy), defense counsel did have a recourse. That recourse was to seek a stay while he further researched his guidelines, confronted his client with the certain prospect of life imprisonment, and ultimately clarified the realities of this prosecution with the Defendant.

Here, no proper label of "trial strategy" immunizes the attorney's decision from Sixth Amendment challenges, in the context of failing to seek an interlocutory appeal and stay. See, *Martinez-Macias v. Collins*, 810 F.Supp. 782, 786 (W.D. TX 1991), *aff'd* 979 F.2d 1067 (5th Cir. 1992) (finding defense counsel strategy unreasonable, and thus grounds for ineffective assistance of counsel, where the law is not well researched); *U.S. v. Span*, 75 F.3d 1383, 1389-1390 (9th Cir. 1996) ("The government characterizes defense counsel's conduct at trial as a strategic decision . . . [w]e have a hard time seeing what kind

of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client's only defense . . . "). Here, given the weight of the prosecution's evidence in this case, there was simply no trial strategy that could result in success and a procedural delay was clearly in the Defendant's best interest. See, *Berryman v. Morton*, 100 F.3d 1089 (3rd Cir. 1996) ("Assuming that the state court correctly found that trial counsel had a strategy, we find that it erred in its legal conclusion as to the reasonableness of Mr. DePalma's 'strategy' as to each of the grounds set forth in Berryman's petition.") Delay was tantamount to victory since trial equated to defeat. Therefore counsel was required to discuss with Sanchez the advisability of seeking to stay the proceedings, rather than proceed forward to trial. He did not.

The Defendant recognizes that *Horton* pertains to the sentencing proceedings in a death penalty case. There, this Court held that, "[t]o failed [sic] to do any investigation because of the mistaken notion that mitigating evidence is inappropriate is indisputably below reasonable professional norms.", *Horton*, 941 F.2d at 1462. Similarly, this Court has found that "strategic" decisions based upon a misunderstanding of the law are entitled to less deference than otherwise. *Horton*, 941 F.2d at 1461 n. 30. Here defense counsel's failure to seek an interlocutory appeal, or even discuss the matter with Sanchez, amounts to an analogous claim of inadequate investigation. In both instances, the failure to take steps that might possibly ameliorate the punishment to be imposed must be considered as a Sixth Amendment violation.

Proceeding to trial under these circumstances can be likened to failing to discuss with a Defendant the

advisability of accepting or rejecting a plea bargain, particularly when trial is dispositive of conviction and a life sentence. See *Boria v. Keane, supra*. Prejudice results from the failure to provide an additional avenue beyond a sentence of life imprisonment and the failure to seek an additional opportunity to allow the Defendant time to either reach a plea agreement or allow a more reasoned explanation of the Sentencing Guidelines.

Here, defense counsel neither sought a stay before the district court nor did he discuss the issue with his client. An attorney must take every possible avenue to protect the client, even from himself. Here, Sanchez' decision to reject the government's very generous plea offer was wrong-headed. Defense counsel recognized that conviction would certainly ensue after trial. Defense counsel also knew, or should have known, that timely application to the district court could postpone the proceedings for a period of time that might allow a more reasoned resolution of plea proceedings. During the interim, he would be able to make headway with his client by properly and fully confronting the life imprisonment alternative. However, notwithstanding that a stay and interlocutory appeal on double jeopardy grounds was the only available means to forestall conviction, defense counsel chose to ignore this avenue.

The Defendant recognizes that decisions of strategy and tactics are ordinarily not reviewable in the context of Section 2255 proceedings, save the exceptions cited here.

However, in this case, it amounts to ineffective assistance of counsel.

Respectfully submitted,

By: /s/ Neil M. Schuster
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(305) 673-3737

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished this 20th day of May, 1999 to Richard E. Byrne, Assistant United State [sic] Attorney, Office of the United States Attorney, 99 N.E. 4th Street, Miami, FL 33132.

By: /s/ Neil M. Schuster
Neil M. Schuster.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	Case No. 95-CR-521-1-LCN
Plaintiff,	**AGUSTIN SANCHEZ' AFFIDAVIT IN SUPPORT OF MOTION UNDER 28 U.S.C. §2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE**
v.	
AGUSTIN SANCHEZ,	
Defendant. /	

I AGUSTIN SANCHEZ, and pursuant to 28 U.S.C. §1746 declare under penalty of perjury that the foregoing information is true and correct.

1. I am the Defendant in the above-styled cause, of legal age. I am currently incarcerated at the Federal Correctional Institution (FCI), 15801 S.W. 137th Avenue, Miami, Florida 33177.

2. On August 6, 1996, I was convicted on drug-related offenses and on December 3, 1996, the sentencing court imposed a term of imprisonment of "life."

3. The following information relates to attorney-client interviews and conferences conducted between defense attorneys, Samuel Rabin, Manuel Casabielle and me. Because I am English illiterate, Mr. Rabin's interviews were all communicated through an interpreter.

4. On July 11, 1996, the trial court granted a defense motion alleging *Brady* violations and a mistrial was ordered. Upon conclusion of the proceeding Mr.

Casabielle told me that the magnitude of the government's *Brady* violation was enormous and I could send my "trial clothing" (suits) home because a second trial would not occur in the near future.

5. On about July 15, 1996, Mr. Rabin and an investigator conducted an attorney-client interview at FDC. We discussed the filing of a "motion to dismiss indictment" based upon double jeopardy grounds and its likelihood of success. Specifically, Mr. Rabin placed great emphasis on the motion and its probability to prevail. A "motion to dismiss indictment" was filed in the district court.

6. On about July 18, 1996, Mr. Casabielle conducted an attorney-client interview at FDC. Mr. Casabielle reiterated the likelihood of success regarding the "motion to dismiss indictment" and expressed a sure sense of optimism. Moreover, Mr. Casabielle informed me that in his years of practicing law he had not seen a motion with such a likelihood to succeed given the circumstances of the case.

7. On July 27, 1996, I telephoned Mr. Rabin's law office and his secretary, Janet "LNU" advised me that Mr. Rabin was simultaneously speaking with the supervising assistant United States Attorneys about a negotiable plea offer. Upon speaking with Mr. Rabin, he told me that he had negotiated a plea offer for a sentence in the range of nine years; the base offense level would commence at 38 based upon 22,000 lbs. of marijuana and the government would agree to reduce six base offense levels (three-level reduction for "Acceptance of Responsibility" USSG §3E1.1 and a three-level reduction for "Safety valve"

USSG §5C1.2) resulting in a Base Offense Level 32, Category I, 121-151 months, and the government would further agree to dismiss the cocaine charges. Mr. Rabin asked me if I were to give approval for a guilty plea via telephone he would secure a nine year deal. I realize the inconsistency of these representations now, as I did then. I declined to accept a guilty plea via telephone and asked Mr. Rabin to conduct an attorney-client interview forthwith to understand the components within the plea offer negotiations.

8. The following day, July 28, 1996, Mr. Rabin and Mr. Casabielle conducted an attorney-client interview at FDC and Mr. Rabin told me the government's plea offer was a good deal, however, he advised that he could no longer guarantee the government's negotiable plea offer of nine years and the plea offer was now for a sentence in the range of ten to twelve years. In spite of the oral negotiated terms, Mr. Rabin did not present the government's documented plea offer nor did he disclose the stipulated terms of the plea offer to me in written form.

9. Then, I specifically asked Mr. Rabin the total amount of years of imprisonment if I were to be convicted by a jury trial and Mr. Rabin said twenty to twenty-five years. Significantly, neither Mr. Rabin nor Mr. Casabielle formally sat down with me to explicitly discuss and explain: (i) the Sentencing Guidelines Manual and its relevant sentencing procedures; and (ii) any mitigating or aggravating factors which could consequently amount to enhancements and result in an increased sentence of up to "life" imprisonment without any possibility for parole, such as what happened to me.

10. Had I been told by my lawyers prior to trial that the most likely sentence after conviction under the guidelines would be "life" imprisonment without any possibility of parole, I would have accepted the earlier plea offer. I never would have gone to trial. I went to trial believing I wouldn't or couldn't get more than 25 years.

11. I was never advised by my lawyers that the law would permit what is known as the interlocutory appeal to the Eleventh Circuit on double jeopardy issue after my first mistrial. Had I been told prior to my second trial that there was a way to postpone what was going on by asking the higher court or the lower court to stay my second trial based upon a claimed double jeopardy violation, I absolutely would have taken advantage of that opportunity.

12. Had I been told, prior to trial, that I had another option, besides either going to trial or pleading, I certainly would have wanted to do that since I was uncomfortable with the other two possibilities. Knowing life imprisonment was otherwise likely, I would have pled guilty.

AFFIANT FURTHER SAYETH NAUGHT.

Respectfully submitted,

By: /s/ Agustin Sanchez
Agustin Sanchez
Reg. No. 44031-004
FCI Miami; Unit F
P.O. Box 979137
Miami, FL 33197

STATE OF FLORIDA)
) ss
COUNTY OF DADE)

BEFORE ME, the undersigned Notary Public, personally appeared AGUSTIN SANCHEZ, the Petitioner in this cause, who after being first duly sworn deposes and says that he is the individual who executed the above and that the above information is true and correct to the best of his knowledge and belief.

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this 29th day of April 1999.

My commission expires: 5/28/03

/s/ Amelia R. Tamayo
NOTARY PUBLIC, State of Florida
[SEAL] Amelia R. Tamayo
Commission #CC 821618
Expires Mar. 28, 2003
Bonded Thru
Atlantic Bonding Co., Inc.

APPENDIX G

[GOVERNMENT EXHIBIT E]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO 95-0421-CR-NESBITT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AGUSTIN SANCHEZ,

Defendant.

_____/

AFFIDAVIT OF SAMUEL J. RABIN, JR., ESQ.

1. YOUR AFFIANT, SAMUEL J. RABIN, JR., is a licensed Attorney in the State of Florida, and has been since February 1979. YOUR AFFIANT's law office is located at 799 Brickell Plaza, Suite 606, Miami, Florida, 33131.

2. AFFIANT's law practice is devoted exclusively to criminal defense in state and federal courts. AFFIANT was retained to, and did represent the above-named Defendant, in the above-styled cause after his arrest and remained his counsel until after sentencing.

AFFIANT represented Defendant Sanchez in two (2) jury trials. The first trial ended in a mistrial and the second trial ended with a jury finding Mr. Sanchez guilty of the charges lodged against him. After AFFIANT's representation of Mr. Sanchez began, Attorney Manuel L. Casabielle was retained to assist AFFIANT in this cause. This occurred before the first trial.

4. On or about May 21, 1999 AFFIANT received, via mail, a pleading entitled, "Memorandum Brief In Support of Petition to Vacate Sentence Filed Pursuant to 28 U.S.C. §2255." At the request of Assistant United States Attorney Richard Byrne, this Affidavit is in response to the material allegations set forth in the aforementioned Memorandum Brief.

5. AFFIANT has a practice of reviewing the *Federal Sentencing Guidelines* with every one of his clients in every Federal case. Although AFFIANT does not have a specific recollection of doing so with Mr. Sanchez, AFFIANT knows that he did so based upon the custom and practice he follows in each Federal case.

6. AFFIANT did not file an interlocutory appeal of the court's denial of Sanchez's motion to dismiss on double jeopardy grounds. AFFIANT considered such an appeal, and discussed same with other lawyers, but AFFIANT decided the record supporting the Court's denial of the double jeopardy motion offered little or no chance of success prosecuting an interlocutory appeal on this issue.

7. Between the first and second trials, AFFIANT engaged in additional plea discussions with the Assistant United States Attorney prosecuting the case. AFFIANT had previously engaged in plea discussions before the first trial but there was no offer that was acceptable to AFFIANT or Mr. Sanchez based upon the position Mr. Sanchez had expressed to AFFIANT.

8. A new plea offer was tendered between the first and second trial that was, in AFFIANT's opinion, very reasonable. It was a plea that AFFIANT believed Mr. Sanchez should have accepted in light of the overwhelming evidence amassed by the government against the Defendant.

9. Contrary to the averments in the "Memorandum Brief In Support of Petition to Vacate Sentence Filed Pursuant to 28 U.S.C. §2255." on more than one occasion, AFFIANT conveyed the plea offer tendered by the prosecutor between the trials and the consequence of a conviction. AFFIANT strongly urged the Defendant to avail himself of the plea and advised the Defendant that the alternative was that he would die in jail if he was convicted at trial.

10. Once the second trial began, shortly after jury selection, Mr. Sanchez advised AFFIANT that he was interested in the second plea offer. AFFIANT approached the Assistant United States Attorney to ascertain whether the plea offer was still available but the prosecutor said that the deadline for accepting same had passed, and that the plea offer was no longer available.

11. Mr. Sanchez does not speak the English language well enough to communicate with counsel in English, and AFFIANT does not speak Spanish well enough to communicate with Mr. Sanchez in Spanish. Consequently, AFFIANT's secretary Jeanette Montenegro, co-counsel, Manuel L. Casabielle, or an investigator working for AFFIANT translated all conversations AFFIANT engaged in with Mr. Sanchez.

12. AFFIANT recalls having more than one conversation with Mr. Sanchez about AFFIANT's strongly held opinion that he accept the plea offer and AFFIANT is of the belief that both Ms. Montenegro and Mr. Casabielle participated in conversations about this subject.

FURTHER, YOUR AFFIANT SAYETH NOT.

/s/ Samuel J. Rabin
SAMUEL J. RABIN, JR.

SWORN to and SUBSCRIBED before me by SAMUEL J. RABIN, JR., who is personally known to me on this 27th day of July, 1999.

/s/ Maria H. Gonzalez
NOTARY PUBLIC, State of Florida at large

[SEAL] Maria H. Gonzalez
My Commission CC688020
Expires October 12, 2001

[GOVERNMENT EXHIBIT F]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER: 95-0421-CR-NESBITT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUSTIN SANCHEZ,

Defendant.
_____/

AFFIDAVIT OF MANUEL L. CASABIELLE

State of Florida)
) ss: Miami
County of Miami-Dade)

BEFORE ME, the undersigned authority, personally appeared **MANUEL L. CASABIELLE,** who is personally

known to me, and after being duly sworn deposes and says as follows:

1. Your Affiant, Manuel L. Casabielle, has been licensed to practice law in the State of Florida since 1982.

2. Your Affiant is a former prosecutor and his law practice is primarily devoted to criminal defense in both State and Federal Courts.

3. Your Affiant was retained to represent Augustine Sanchez, along with Samuel Rabin, prior to Mr. Sanchez first Trial.

4. Your Affiant represented Mr. Sanchez through sentencing.

5. Your Affiant has been asked to respond to allegations that Mr. Sanchez was not advised of the consequences of not accepting a plea that was offered by the government and the failure to file an interlocutory appeal.

6. Your Affiant does not have a recollection of participating in discussions with Mr. Sanchez regarding any plea offers made by the government prior to the first trial, but vaguely remembers realizing, at that time, that the sentencing guidelines provided for life in prison leaving no real option but to try the case.

7. Your Affiant does remember discussions with Mr. Sanchez following the first trial, but before the second, regarding the plea offered by the government.

8. During the aforementioned discussions with Mr. Sanchez, during which Samuel Rabin was present, your Affiant not only encouraged Mr. Sanchez to accept the plea, but also translated for Mr. Rabin when Mr. Rabin did likewise.

9. Your Affiant recalls consoling Mr. Rabin following the meeting with Mr. Sanchez when Mr. Rabin expressed that he felt bad that Mr. Sanchez would not take the plea offer after having explained to Mr. Sanchez the consequences of rejecting the plea.

10. Your Affiant recalls that during the aforementioned discussions with Mr. Sanchez it was made clear to Mr. Sanchez that he would not get out of jail if he was convicted.

11. Your Affiant in good faith believes that the sentencing guidelines were discussed with Mr. Sanchez as it is his custom to do so when communicating plea offers made by the government.

12. Your Affiant deferred to Mr. Rabin's decision not to file an interlocutory appeal, not disagreeing with Mr. Rabin's assessment that the appeal would not succeed.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Manuel L. Casabielle

MANUEL L. CASABIELLE,
Esquire
815 Ponce De Leon Boulevard
3rd Floor
Coral Gables, Florida 33134
Office: (305) 442-2282
Facsimile: (305) 447-0076

SWORN and **SUBSCRIBED** before me on this 1st day of September, 1999.

/s/ Gisela Martha Tramazzo
NOTARY PUBLIC,
State of Florida

My Commission Expires:

[SEAL] Gisela Martha Tramazzo
My Commission, CC787047
Expires December 12, 2002

[GOVERNMENT EXHIBIT G]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No 95-0421-CR-NESBITT

UNITED STATES
OF AMERICA,

Plaintiff,

vs.

AGUSTIN SANCHEZ,

Defendant.
_____/

AFFIDAVIT OF JEANETTE MONTENEGRO

STATE OF FLORIDA:

COUNTY OF MIAMI-DADE:

BEFORE ME, the undersigned authority, personally appeared Jeanette Montenegro, who after being duly sworn on oath deposes and says as follows:

1. Affiant has been employed by Samuel J. Rabin, Jr. as his legal assistant since the year 1990.

2. Affiant first became acquainted with the Defendant, AGUSTIN SANCHEZ, during Mr. Rabin's representation of said Defendant in the first trial. MR. SANCHEZ does not speak the English language and Mr. Rabin does not speak enough Spanish to carry on a detailed legal conversation. Therefore, your Affiant served as intepreter [sic].

3. On more than one (1) occasion Affiant participated in meetings between MR. SANCHEZ and Mr. Rabin concerning the government's plea offer. Affiant succintly recalls translating to MR. SANCHEZ Mr. Rabin's suggestion that he seriously consider taking the plea because if he (SANCHEZ) went to trial and was found guilty by the jury, he would receive a life sentence.

4. Affiant remembers MR. SANCHEZ declining to even consider the plea and saying that he had his reasons and wanted to go to trial.

5. Additionally, Affiant recalls speaking to the Defendant's wife, Isaura Sanchez, regarding said plea and suggesting to Mrs. Sanchez that she speak with her husband and ask him to reconsider his decision to go to trial because of the possible life sentence.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ Jeanette Monten Egro
JEANETTE MONTEN EGRO

SWORN to and SUBSCRIBED
before me on this 27 day of July, 1999

/s/ Maria H. Gonzalez
NOTARY PUBLIC, State of Florida

[SEAL] Maria H. Gonzalez
My Commission CC688020
Expires October 12, 2001

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

AGUSTIN SANCHEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

Case No. 95-CR-421-1-LCN
Referred to Magistrate Judge Simonton

NOTICE OF FILING SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF PETITIONER'S REPLY TO GOVERNMENT'S RESPONSE IN OPPOSITION TO MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. §2255

COMES NOW the Petitioner, AUGUSTIN SANCHEZ, by and through his undersigned counsel, and hereby respectfully files this his Notice of Filing Supplemental Affidavit in Support of Petitioner's Reply to Government's Response in Opposition to Motion to Vacate, Set Aside, or Correct Snetnence [sic] Pursuant to 28 U.S.C. §2255.

Respectfully submitted,

By: /s/ Neil M. Schuster
NEIL M. SCHUSTER
Florida Bar No. 216909
407 Lincoln Road, Suite 11-B
Miami Beach, FL 33139
(305) 673-3737
Fax: (305) 534-5470

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished this 30 day of September, 1999 to Richard E. Byrne, Assistant United State [sic] Attorney, Office of the United States Attorney, 99 N.E. 4th Street, Miami, FL 33132.

By: /s/ Neil M. Schuster
Neil M. Schuster

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

AGUSTIN SANCHEZ,

Defendant.
_____/

Case No. 95-CR-421-1-LCN

AFFIDAVIT OF ISAURA SANCHEZ IN SUPPORT OF DEFENDANT'S PETITION TO VACATE SENTENCE

I, ISAURA SANCHEZ, being duly sworn, on oath, deposes and states as follows:

1. I have reviewed from English to Spanish the Affidavit Provided by Samuel Rabin's legal assistant, Jeanette Montenegro in Support of the Government's Response to the Pending Section 2255 Petition.

2. I dispute, as a matter of fact, that legal assistant, Jeanette Montenegro ever advised me that my husband

would be facing life imprisonment upon conviction. I have absolutely no idea why she would say such a thing but it is simply untrue.

3. During the course of my meetings with that secretary, she constantly told me that if he was convicted, after being found guilty by the jury, he would receive twenty years. She did not talk about life imprisonment.

4. Rather, I was advised that if my husband accepted the plea offer he would receive somewhere from nine to thirteen years imprisonment.

5. I strongly dispute any claim that I was ever advised that he was looking at life imprisonment. Rather, the worst sentence I was told he could receive, if convicted, was twenty years.

6. Shortly subsequent to the mistrial in my husband's case, Samuel Rabin told me that he would be able to immediately file a motion to get the case dismissed since the prosecution violated my husband's rights. I later understand that the motion was not filed until around the day of his second trial.

7. I was told by Mr. Rabin that I had to hire another lawyer to do so because that lawyer could do a better job than he. No one ever explained to us why they waited until near the day the trial was scheduled to start on the second trial to file that motion.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Isaura Sanchez
Isaura Sanchez
12700 SW 66th Ter. Drive
Miami, FL 33183

The foregoing instrument was acknowledged before me this 24th day of September, 1999 by Isaura Sanchez.

[SEAL] GEORGE M TAVARES JR
My commission CC582714
Expires Jun. 18, 2000

/s/ George M. Tavares, Jr.
Print Name:
George M. Tavares, Jr.
Notary Public
State of Florida

Personally known to me ___ Type of I.D. Produced
Drivers License #S522-404-65-743-0

My commission expires:

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	:	Case No. 95-CR-421-Nesbitt/ Simonton
Plaintiff,	:	99-1445-Civ-Nesbitt/ Simonton
v.	:	
AGUSTIN SANCHEZ,	:	
Defendant.	:	
.....	:	

OBJECTIONS TO MAGISTRATE JUDGE'S RECOMMENDATION AND ORDER DATED APRIL 28, 2000 (AND RECEIVED MAY 4, 2000) SUGGESTING DENIAL OF SANCHEZ' PETITION TO VACATE SENTENCE FILED PURSUANT TO 28 U.S.C. §2255.

COMES NOW the Petitioner, AUGUSTIN SANCHEZ, by and through his undersigned counsel, and pursuant to Local Rule 4(a)(1), Magistrate Judge Rules S.D.Fla. and 28 U.S.C. §636(b)(1)(A), and respectfully files this his objections to Magistrate Judge Simonton's Report and Recommendation dated April 28, 2000 (and received by the undersigned counsel on May 4, 2000) suggesting denial of Sanchez' petition to vacate sentence filed pursuant to 28 U.S.C. §2255 and request *de novo* review. A copy of that order is appended hereto as Exhibit A. In support of these objections Petitioner avers:

I.

PREFACE

This memorandum seeks to highlight factual matters at issue, suggests where the Report errs, describes how competing facts should be resolved, and discusses the misapplication of the governing law to those facts. To this end, the Petitioner will address matters raised at evidentiary hearing, matters of record, and those pertinent to the Report under review. Courts have held that the Magistrate Judge Act, 28 U.S.C. § 631 et seq., permits *de novo* review by the district court if timely objections are filed.

II.
ARGUMENT

A. Objections to Factual Findings

1. Factual Background

The Petitioner agrees with the chronology of events described in the reports "background." See Report, p. 2.

2. Findings of Fact

This collateral attack is premised upon the claim that Petitioner received ineffective assistance of counsel in the plea bargaining context of these proceedings as a consequence of trial counsel's, (1) failure to explain to the Petitioner that he was facing life imprisonment under the Sentencing Guidelines upon conviction, rather than twenty or so years, and (2) the failure to seek a stay of the second trial or file an interlocutory appeal to the trial court's denial of the double jeopardy motion to either

improve the Defendant's plea bargaining posture or delay resolution of an otherwise extraordinarily improvident decision refusing the government's plea offer.

The Petitioner respectfully seeks *de novo* review of the trial court's conclusion that attorneys Robin and Cassabielle told Sanchez, "that if he did not accept the [plea] offer he would die in jail." Report, p. 6.

The Petitioner respectfully seeks *de novo* review of the factual finding that, "Sanchez refused to accept the plea offer, stating that he had a strong feeling that something would happen at trial." Report, p. 6.

The Petitioner also objects to the report's failure to conclude that both before *and* after trial, Rabin advised Sanchez the double jeopardy issue was a strong issue. See Report, p. 8., ¶14. ("After the trial, Rabin told Sanchez and his wife that the double jeopardy issue is a strong issue on appeal.")

The Petitioner strongly objects to the Magistrate Judge's finding that Sanchez' testimony was not credible that, "had he been given the specific advise [sic] that under the guidelines he faced a certainty of life imprisonment upon conviction, this advice would have caused him to accept the plea offer prior to its expiration." Report, p. 8, ¶15.

Trial counsel Rabin and Cassabielle credibly testified there was overwhelming evidence of the Defendant's guilt. Rabin and Cassabielle credibly testified that the trial result was a forgone conclusion. However, the evidence is equally clear that they presented Sanchez with

no written plea agreement nor did they reduce any purported recommendations (with respect to accepting the government's plea offer) either to a written instrument or to a letter. The Petitioner disputes that Rabin, who did not speak Spanish, adequately explained that the Sentencing Guideline computations in this case required a term of life imprisonment upon conviction after trial. The Report properly finds that it was Rabin's secretary, Jeanette Montenegro who served as the translator and that Montenegro translated to Sanchez merely "the **possibility** that he was facing life in jail." Report, pp. 6-7, ¶10, DE 20 at 107.[1] In this particular case, like many others, there was simply no likelihood that the Defendant would prevail at trial. Here, the certainty of life imprisonment was so clear that counsel's duty was to unequivocally advise his client of that reality. The findings of fact do not sufficiently establish the foregoing.

a. Facts Relating to Base Offense Level.

As evidenced by the trial evidence, the PSR, and the parties briefs on appeal, the bare minimum offense level without adjustments amounts to Base Offense Level 38. Base Offense Level 38 would be set in this case, before adjustments, because it involved more than six hundred (600) kilograms of cocaine, which is more than three times the One Hundred Fifty (150) kilograms required to

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[1] Petitioner disputes the claims from the government witnesses concerning the timeliness of their advisement as well as the substance thereto. Petitioner respectfully seeks leave to supplement his objections with BOP records establishing the chronology of the attorney-client visits.

establish that level. However, because the offense conduct also encompassed more than twenty two thousand (22,000) pounds of marijuana, there was more than a sufficient basis to allow an upward departure from that guideline range.

b. Facts Relating to Adjustments to Base Offense Level.

1. Role in the offense.

Consideration of just a single government exhibit at trial, GX 31, establishes an indisputable factual basis for a four level role adjustment pursuant to the provisions of USSG §3B1.1(a). See also, AUSA Byrne's "role" related remarks at Sanchez' sentencing. *United States v. Sanchez*, Tr. Sent. Proc., pp. 24-31, appended as Exhibit A to Post-Evidentiary Hearing Memorandum and *United States v. Sanchez*, Addendum to PSR re: Adjustment for Role in the Offense, p. 2, appended as Exhibit B to Post-Evidentiary Hearing Memorandum. See also, *United States v. Sanchez*, PSR, p. 10. Therefore, based upon the evidence, a four-level role adjustment was a foregone conclusion. The four level adjustments, resulting in an adjusted Base Offense Level (ABOL) of 42, applied before considering other issues. Clearly, under the factual findings here, Sanchez was not advised by his counsel that he was facing a minimal ABOL of 42 (360 months-life) before matters concerning obstruction of justice or a co-defendant's possession of a weapon were considered.[2]

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[2] No objection is raised concerning the fact that sentencing objections were filed and prosecuted as they should have been.

2. Obstruction of Justice.

Prior to trial, this Court found reason to revoke Sanchez' bond. The revocation was predicated upon a clear violation of his conditions of release and motion to amend conditions of release.[3] Therefore, as a practical matter, there was no doubt an additional two level adjustment beyond adjusted Base Offense Level 42 would apply. This also was a forgone conclusion. Sanchez and his counsel should have known that his adjusted Base Offense Level, particularly in light of his role and judicial determination that he obstructed justice, would result in an ABOL of 44 (life).

Under these circumstances, given the Base Offense Level and adjustments applicable to the offense behavior, it was a certainty, not just a **possibility,** as described by Rabin's secretary Jeanette Montenegro, that Sanchez would receive a life sentence if his case was tried and the jury concluded guilt on any single count.

Petitioner recognizes that defense counsel did seek to challenge the varied adjustments.

[3] See Motion by USA as to Agustin Sanchez to invoke bond and issue arrest warrant, DE 106; Order as to Agustin Sanchez granting motion to revoke bond and issue arrest warrant, DE 107; Order as to Agustin Sanchez to revoke bond, DE 110; Sealed documents DE 111. This Honorable Court can also take judicial notice of the McClain hearing as a consequence of unresolved issues surrounding counsel's participation in the complained of behavior.

B. Suggested Factual Conclusions.

Notwithstanding his penal predicament, Sanchez credibly testified that had he been properly advised that he was facing the certainty of life imprisonment upon conviction he would have accepted the government's generous plea offer of somewhere around eleven (11) years subsequent to his mistrial. It was only as a consequence of Rabin and Jeanette Montenegro's mistaken translation of his true predicament that Sanchez declined the government's plea offer.

The credibility finding against Sanchez, Report, p. 8, n. 5, essentially concludes that a criminal defendant is never to be believed because of his penal status.

Upon *de novo* review, the Petitioner respectfully invites this Honorable Court to find that Rabin's inability to recall what adjustments he discussed with Sanchez, beyond the weapon enhancement, combined with Jeanette Montenegro's advice that life imprisonment was merely a possibility caused Sanchez to decline the plea offer and rely upon the belief that only 20-25 years would be imposed.

C Objections to Conclusions of Law.

The Petitioner relies upon the authority of law presented in his earlier memorandum. See Memorandum Brief in Support of Petition to Vacate Sentence Filed Pursuant to 28 U.S.C. §2255; Post-Evidentiary Hearing Memorandum. Petitioner respectfully invites this Honorable Court to conclude that Rabin's claim that Sanchez was looking at 20-25 years or merely the possibility of life

sentence constitutes ineffective assistance of counsel. Such advice must be distinguished from the certainty of life imprisonment. Sanchez initial decision to forego pleading guilty premised upon counsels' misadvice serves to meet the Strickland two-prong analysis. Knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty. See, for example, *Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir. 1996) (counsel ineffective in giving no advice about desirability of plea offer).

A plea tendered upon patently erroneous advice is considered involuntary, unknowing, and subject to vacation premised upon ineffective assistance of counsel. *United States v. Rumery*, 698 F.2d 764, 766 (5th Cir. 1983). Likewise, a decision to try one's case based upon erroneous sentencing advice fails to meet the minimum standards of effectiveness. See also, *Trahan v. Estelle*, 544 F.2d 1305, 1309 (5th Cir. 1977).

The Report emphasizes Sanchez' age, however, the certainty of life imprisonment in one's early 50's is substantially more significant than a 20-25 year sentence with a possibility of some future "safety valve" legislation. The trial court concludes as a matter of law, that because Sanchez was in his 50's at the time of the plea there was little or no difference between a life sentence and a 20-25 year sentence. These facts, however, should be governed by *United States v. Gordon*, 156 F.3d 376 (2nd Cir. 1998) which is cited in the Report, p.15. *Gordon* establishes that a defendant is denied effective assistance of counsel in violation of its Sixth Amendment right when a lawyer underestimates the potential maximum

sentence. It does not rely upon a determination of the Defendant's age.

No matter what his age, a defendant has the right to make a reasonably informed decision whether to accept a plea offer. See *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985) (voluntariness of guilty plea depends on adequacy of counsel's advice); *Von Moltke v. Gillies*, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948) ("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.").

In *Scott v. Wainwright*, the Eleventh Circuit notes that defense counsel's failure to familiarize himself with the law that applied to the facts made him ineffective so as to compel vacation of his plea. 698 F.2d 427 (11th Cir. 1983). By analogy, the same claim is established here. The advice appropriate in this case, within the realm of competence demanded of attorneys representing criminal defendants in federal cases involving large scale importations, should be direct and precise. Sanchez was looking at life imprisonment upon conviction; no "ifs," no "ors," no "buts."

In *Kennedy v. Dimagio*, the Fifth Circuit states, "it is elementary that a plea entered in reliance on the defendant's attorneys patently erroneous statement of the law in relation to the facts" amounts to ineffectiveness. 725 F.2d 269, 273 (5th Cir. 1984). The same can be said with regard to a decision to try one's case in reliance upon an erroneous statement of the law, as applied to sentencing provisions. This is exactly what happened in this case.

With the advent of the Sentencing Reform Act and the Guideline Regime, counsel knows beforehand, with some variation, the sentencing range applicable to the specific offense behavior. Although the law does not require that defense counsel prognosticate each sentencing proceedings with exactitude in each case, in some cases, such as the instant case, there is very little doubt left as to what sentence the district court will ultimately impose. This is the basis of the holdings in *United States v. Gordon*, supra. See *Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir.1996) (holding that ineffective assistance of counsel during plea negotiations justified §2254 habeas relief); *United States v. Day*, 969 F.2d 380, 39, 44 (3d Cir.1992) (holding that §2255 could provide relief where trial counsel was ineffective by giving defendant substandard advice about his sentence exposure under the Sentencing Guidelines during plea negotiations) and other earlier cases such as *Toro v. Fairman*, 940 F.2d 1065, 1067 (7th Cir.1991) and this Circuit's decision in *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir.1981). As the Second Circuit previously noted, " '[t]he decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case . . . [and] counsel may and must give the client the benefit of counsel's professional advice on this crucial decision.' " *Boria*, 99 F.3d at 496-97 (quoting Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases (1988)). Finally, it follows that "[k]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty." *Day*, 969 F.2d at 43.

These cases do not discuss the age of the criminal defendant. The difference between 20-25 years and a life sentence are extremely significant, not only to the extent of a "pine box" disposition on the one hand and the possibility for release on the other, but also as to where one serves one's jail term.

Here, given the predicate facts, and even fully crediting the testimony of Sam Rabin's secretary, Jeanette Montenegro, Rabin only advised Sanchez of the possibility of a sentence of life imprisonment. Rabin states that he relied upon his co-counsel, Mr. Cassabielle and Jeanette Montenegro to translate in all his consultations with his client. Therefore, it is not of legal or factual import what Mr. Rabin believes he told his client. Rather, it is what was translated by either Jeanette Montenegro or Manuel Cassabielle that is significant.[4]

The Report's reliance upon the Government's argument that the outcome cannot properly rest upon Sanchez self-serving post-conviction testimony is belied by Sanchez' willingness to accept a plea during jury selection and the fact there is no record evidence that he professed his innocence. Sanchez' testimony should stand since there is no significant rebuttal that he would have accepted the plea offer had he known he was facing the near certainty of life imprisonment rather than 20-25 years. See *Risher v. U.S.*, 992 F.2d 982, 983-984 (9th Cir.

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[4] The report should not rely upon defense counsel's claims of practice and pattern particularly when there is no specific recollection of the required or constitutionally demanded advice.

1993) ("We hold that under these circumstances, a competent lawyer would have warned *Risher* of the significant risk that he would be sentenced under the . . . provisions of the Guidelines. A lawyer who failed to so advise his client cannot be said to have been functioning as counsel within the meaning of the Sixth Amendment."). *Risher* stands for the proposition that counsel's assistance is ineffective where he failed to notify defendant that the career offender provisions of the guideline may apply.

The Report, p. 12 specifically refuses to rely upon *Esslinger v. Davis,* 44 F.3d 1515, 1530 (11th Cir. 1995) stating that the facts were dissimilar. However in *Esslinger,* this Circuit found a Sixth Amendment violation when trial counsel did not properly advise the defendant of the habitual offender sentencing provisions that applied as a consequence of his prior felony. Because the defendant was not aware that he "was subject to an enhance [sic] penalty under Alabama's Habitual Offender Act" the court found a Sixth Amendment violation in the context of his guilty plea. The same can be said with regard to the facts before this court which suggests a similar legal conclusion. Because Sanchez did not know of the absolute certainty of life imprisonment upon conviction after trial, a matter not vested to the court's sentencing discretion, that case provides an example of "simply unexcusable" behavior of defense counsel. *Id.*

The Defendant respectfully invites this Honorable Court to similarly find that counsel's assistance is ineffective when counsel fails to notify the Defendant that the life imprisonment provisions of the guidelines will certainly apply.

Likewise, although the Report declines to accept its precedential value, in *United States v. Gaviria*, the government offered to let the defendant plea guilty to a drug conspiracy but the offer was rejected after defense counsel incorrectly advised him that he would qualify as a career offender with a sentencing range of 360 months to life. 116 F.3d 1498 (DC Cir. 1997) The defendant argued that if counsel correctly advised him, he would have accepted the government's offer and received a 15-20 year sentence. The court noted that the defendant would be entitled to be sentenced under the more generous plea offer if he established a "reasonable probability" he would have entered a plea and if the government would have entertained a "unwired plea" separating him from his co-defendants. Sanchez has made this showing.

The Petitioner respectfully invites this Honorable Court to find that *Gordon*, *Gaviria* and *Risher* should guide these legal conclusions. "[F]amiliarity with the structure and basic content of the guidelines . . . 'has become a necessity for counsel who seek to give effective representation.' *United States v. Gaviria*, 116 F.3d 1498, 1512 (DC Cir. 1997) (quoting *United States v. Day*, 969 F.2d 39, 43 (3rd Cir. 1992)). In *Gaviria*, the defendant met *Strickland's* first test because his lawyer, ignoring case law interpreting Guideline's career offender provision, gave mistaken advice which influenced his decision to go to trial. That same principle applies where, as here, counsel ignores the relevant Guideline provision altogether. Where lawyers misinterpret the Guidelines and the Defendant acts to his detriment (*Gaviria*) such drastic missteps clearly satisfy *Strickland's* two prong test. This amounts to errors so "serious that counsel was not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *United States v. Headley*, 923 F.2d 1079, 1083-84 (3rd Cir. 1981) (counsel's failure to seek potentially fruitful downward departure under Section 3B1.2 fell outside 'prevailing professional norms' and therefore was ineffective.)

C. Suggested Conclusion of Law.

The Defendant respectfully invites this Honorable Court to render a finding of ineffective assistance of counsel consistent with the findings in *Gordon, Risher, Boria*, etc.

WHEREFORE the Petitioner respectfully files these objections to the report and recommendation.

Respectfully submitted,

By: /s/ Neil M. Schuster
NEIL M. SCHUSTER
Florida Bar No. 216909
407 Lincoln Road, Suite 11-B
Miami Beach, FL 33139
(305) 673-3737
Fax: (305) 534-5470

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by **fax and mail** this 15 day of May, 2000 to Richard E. Byrne, AUSA, Office of the United States Attorney, 8245 N.W. 53rd St., Miami, FL 33166.

By: /s/ Neil M. Schuster
Neil M. Schuster

APPENDIX J

AUGUST 4th, 2000

Dear Mr. Schuster,

Jeanette Montenegro ***never once*** visited the **FDC MIAMI** with Mr. Rabin after Mistrial was ordered on July 11TH, 1996 until August 13TH, 1996 which was seven (7) days after Sanchez was convicted. Her ***sworn affidavit and testimony*** shows that she committed ***perjury*** during the Evidentiary Hearing held before **U.S. Magistrate Judge Andrea M. Simonton** on November 3RD, 1999, (See **Transcript pages #108, 109** attached). This testimony was given under cross-examination by you and twice on page 108 she stated that she went to **FDC MIAMI** with Mr. Rabin specifically **after the mistrial**. U.S. Magistrate Judge Andrea M. Simonton in her recommendation to deny the **Motion To Vacate Conviction**, pursuant to **28 U.S.C. 2255**, did in fact credit Jeanette Montenegro's testimony page #7 of transcript recommendation.

As you are aware, **Newly Discovered Evidence** is of great concern, and this issue of **Perjury – *with documentation of proof*** needs to be addressed.

AUSA Richard Byrne in his objections response states the testimony of Rabin and Casabielle was buttressed by Jeanette Montenegro's testimony.

Mr. Schuster, it is the wish of your client, Agustin Sanchez, that you vigorously pursue this issue of Jeanette Montenegro's ***Sworn Affidavit*** **and her *false testimony***, which she gave ***under oath***. Jeanette Montenegro testified that she prepared her own Affidavit. (See Transcript page 110 attached) on cross examination by you.

U.S. Magistrate Judge Andrea M. Simonton did credit Jeanette Montenegro's testimony, which in fact was ***False***.

Your Client, Agustin Sanchez wishes to convey to you that he has the utmost trust and faith in your ability to pursue this issue and if there is any question as to any **"Fee"** in order to prepare a motion and file it, then please contact his wife immediately in this regard.

Thanking you in advance for your time and consideration in this matter, I remain optimistic that you will prevail.

/s/ Agustin Sanchez
Agustin Sanchez #44031-004

/s/ Jimmy G. Robertson
Prepared by Jimmy G. Robertson

[Illegible]

[GOVERNMENT EXHIBIT G reproduced, *supra*, at pages G-7 – G-9]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 95-0421-CR-NESBITT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AGUSTIN SANCHEZ,

Defendant.

* * *

[108] accept the government's plea?

A. He was practically begging.

MR. BYRNE: Your Honor, I have no further questions.

THE COURT: Cross-examination.

MR. SCHUSTER: Thank you.

CROSS EXAMINATION

BY MR. SCHUSTER:

Q. My name is Neil Schuster. Good afternoon. My apologies for keeping you waiting so long, also.

You provided an affidavit in connection with this case?

A. Yes, I did.

Q. And the affidavit also says that Mr. Rabin advised Mr. Sanchez of the possibility of life imprisonment if he was convicted?

A. Yes, sir.

Q. And your testimony today is consistent with that –

A. Yes, sir.

Q. – that he advised him of that possibility?

A. Yes, sir.

Q. Now, do you recall whether you ever traffic to the jail to meet with Mr. Sanchez after that mistrial was granted?

A. Oh, yes.

Q. So after the mistrial, you did travel to the jail with [109] Mr. Rabin?

A. Yes, sir.

Q. That's when he explained to him about the possibility of life imprisonment?

A. I can't remember, sir. I apologize.

Q. No, no, that's okay. It is a long time ago.

With respect to the date, the approximate date that you received that final plea offer from the government, would it be fair to say that it was just about the weekend before trial was to recommence?

A. I can't remember.

Q. You don't just don't remember. Okay.

Do you recall being on the telephone with Mr. Sanchez at one point in time when you were translating for Mr. Rabin and Mr. Sanchez asked you to please ask Mr. Rabin to come see him in person to discuss the plea agreement because he couldn't make a decision on the phone?

A. Several times he called on me on the phone and asked us to come by.

Q. So that would have been consistent with him wanting to see Mr. Rabin in person?

A. I imagine so.

Q. Now, on at least one occasion you discussed with Mr. Sanchez the dismissal motion that was pending?

A. I can't remember.

[110] Q. Do you recall?

A. I assume we did, but I can't remember.

Q. Do you recall telling Mr. Sanchez that he would be able to go back home if that dismissal motion was successful?

A. I can't remember.

Q. Do you remember telling Mr. Sanchez about the dismissal motion?

A. I can't remember.

Q. All right.

A. It was so long ago.

Q. The affidavit that was filed in this case, did you prepare that or did Mr. Rabin prepare that for you?

A. No, I prepared it.

Q. Do you have any specific recollection of any of your meetings with Mr. Rabin where he took out a pencil and a guideline book and calculated the specifics of the guidelines with Mr. Sanchez?

A. Yes. Several.

Q. Do you remember exactly what those calculations were?

A. I can't remember the levels, no.

Q. You don't know the levels?

A. Not offhand, no.

Q. But you do remember that Mr. Rabin made clear to Mr. Sanchez that he had the possibility of a life sentence?

A. Oh, yes, definitely.

TOTAL VISIT(S) FOR THIS INMATE: 128

DATE: 07-26-2000 FDC MIAMI PAGE: 1

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VISITING HISTORY FOR INMATE NAME:
SANCHEZ, AGUSTIN
REGISTER NUMBER: 44031-004
DATES: 05-03-1996 – 03-18-1997

==========

VISIT DATE	NAME	RELATION	PTS
05-05-1996	RABIN JR., SAMUEL J.	ATTORNEY	0
05-10-1996	RABIN JR., SAMUEL J.	ATTORNEY	0
05-10-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
05-13-1996	SOLOMON, HARRY M.	ATTORNEY	0
05-17-1996	RABIN JR., SAMUEL J.	ATTORNEY	0

05-17-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
05-18-1996	ISAURA, SANCHEZ	SPOUSE, WIFE	0
05-23-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
05-24-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
05-25-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	0
05-31-1996	RABIN JR., SAMUEL J.	ATTORNEY	0
05-31-1996	CASABIELLE, MANUEL	ATTORNEY	0
06-01-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
06-01-1996	GAVILAN, ESPERANZA	MOTHER	0
06-04-1996	CASABIELLE, MANUEL	ATTORNEY	0
06-08-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
06-08-1996	SANCHEZ, LISSY	CHILD, DAUGHTER MINOR	0
06-12-1996	CASABIELLE, MANUEL	ATTORNEY	0
06-15-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
06-15-1996	GAVILAN, ESPERANZA	MOTHER	0
06-22-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
06-22-1996	GAVILAN, ESPERANZA	MOTHER	0
06-26-1996	RABIN JR., SAMUEL J.	ATTORNEY	0

06-26-1996	CASABIELLE, MANUEL	ATTORNEY	0
06-28-1996	CASABIELLE, MANUEL	ATTORNEY	0
07-04-1996	CASABIELLE, MANUEL	ATTORNEY	0
07-06-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
07-06-1996	GAVILAN, ESPERANZA	MOTHER	0
07-07-1996	CASABIELLE, MANUEL	ATTORNEY	0
07-07-1996	RABIN JR., SAMUEL J.	ATTORNEY	0
07-13-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	0
07-13-1996	GAVILAN, ESPERANZA	MOTHER	1
07-14-1996	SALAZAR, ALFRED E.	ATTORNEY	0
07-14-1996	RABIN JR., SAMUEL J.	ATTORNEY	0
07-20-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	0
07-20-1996	GAVILAN, ESPERANZA	MOTHER	1
07-23-1996	CASABIELLE, MANUEL	ATTORNEY	0
07-26-1996	RABIN JR., SAMUEL J.	ATTORNEY	0
07-26-1996	CASABIELLE, MANUEL	ATTORNEY	0
07-27-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	0
07-27-1996	GAVILAN, ESPERANZA	MOTHER	0

08-03-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	0
08-03-1996	GAVILAN, ESPERANZA	MOTHER	1
08-10-1996	RABIN JR., SAMUEL J.	ATTORNEY	0
08-10-1996	CASABIELLE, MANUEL	ATTORNEY	0
08-10-1996	SANCHEZ, JOAQUIN	CHILD, SON ADULT	0
08-10-1996	GAVILAN, ESPERANZA	MOTHER	0
08-10-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	0
08-13-1996	RABIN JR., SAMUEL J.	ATTORNEY	0
08-13-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
08-15-1996	QUINON, JOSE M	ATTORNEY	0
08-15-1996	STRAFER, GUY R.	ATTORNEY	0
08-17-1996	ISAURA, SANCHEZ	SPOUSE, WIFE	1
08-17-1996	GAVILAN, ESPERANZA	MOTHER	0
08-21-1996	LOPEZ, LINDA	ATTORNEY	0
08-21-1996	SOLOMON, HARRY M.	ATTORNEY	0
08-24-1996	RABIN JR., SAMUEL J.	ATTORNEY	0
08-24-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
08-26-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
08-26-1996	GAVILAN, ESPERANZA	MOTHER	0

09-06-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
09-07-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
09-07-1996	RABIN, SAMUEL	ATTORNEY	0
09-13-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
09-13-1996	SANCHEZ, JOAQUIN	CHILD, SON ADULT	0
09-18-1996	RABIN, SAMUEL	ATTORNEY	0
09-18-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
09-27-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	2
09-27-1996	SANCHEZ, JOAQUIN	CHILD, SON ADULT	0
10-04-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
10-05-1996	RABIN, SAMUEL	ATTORNEY	0
10-05-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
10-11-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
10-17-1996	RABIN, SAMUEL	ATTORNEY	0
10-17-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
10-18-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	0
10-25-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	0
10-25-1996	GAVILAN, ESPERANZA	MOTHER	1
11-01-1996	GAVILAN, ESPERANZA	MOTHER	0

11-01-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	0
11-07-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
11-08-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
11-08-1996	GAVILAN, ESPERANZA	MOTHER	0
11-13-1996	QUINON, JOSE M	ATTORNEY	0
11-15-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
11-20-1996	COHEN, SHARON	ATTORNEY	1
11-22-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	0
11-22-1996	GAVILAN, ESPERANZA	MOTHER	1
11-22-1996	SANCHEZ, JOAQUIN	CHILD, SON ADULT	0
11-26-1996	RABIN, SAMUEL	ATTORNEY	0
11-26-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
12-06-1996	SANCHEZ, JOAQUIN	CHILD, SON ADULT	1
12-06-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	0
12-06-1996	GAVILAN, ESPERANZA	MOTHER	0
12-13-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	0
12-13-1996	SANCHEZ, LISSY	CHILD, DAUGHTER MINOR	0
12-13-1996	GAVILAN, ESPERANZA	MOTHER	0

12-20-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
12-20-1996	SANCHEZ, JOAQUIN	CHILD, SON ADULT	0
12-20-1996	GAVILAN, ESPERANZA	MOTHER	0
12-27-1996	SANCHEZ, ISAURA	SPOUSE, WIFE	1
12-31-1996	MONTENEGRO, JEANETTE M.	ATTORNEY	0
12-31-1996	RABIN, SAMUEL	ATTORNEY	0
01-03-1997	QUINON, JOSE M	ATTORNEY	0
01-03-1997	SANCHEZ, ISAURA	SPOUSE, WIFE	1
01-03-1997	SANCHEZ, JOAQUIN	CHILD, SON ADULT	0
01-03-1997	GAVILAN, ESPERANZA	MOTHER	0
01-10-1997	SANCHEZ, ISAURA	SPOUSE, WIFE	1
01-10-1997	SANCHEZ, LISSY	CHILD, DAUGHTER MINOR	0
01-10-1997	GAVILAN, ESPERANZA	MOTHER	0
01-14-1997	FERRO, KATHERINE	ATTORNEY	0
01-14-1997	COHEN, ERIC M	ATTORNEY	0
02-07-1997	SANCHEZ, ISAURA	SPOUSE, WIFE	1
02-07-1997	GAVILAN, ESPERANZA	MOTHER	0
02-14-1997	SANCHEZ, ISAURA	SPOUSE, WIFE	0

02-14-1997	GAVILAN, ESPERANZA	MOTHER	1
02-21-1997	GAVILAN, ESPERANZA	MOTHER	1
02-21-1997	SANCHEZ, ISAURA	SPOUSE, WIFE	0
02-21-1997	QUINON, JOSE M	ATTORNEY	0
03-07-1997	SANCHEZ, ISAURA	SPOUSE, WIFE	0
03-07-1997	GAVILAN, ESPERANZA	MOTHER	1
03-09-1997	SANCHEZ, JOAQUIN	CHILD, SON ADULT	0
03-09-1997	SANCHEZ, ISAURA	SPOUSE, WIFE	0
03-09-1997	GAVILAN, ESPERANZA	MOTHER	1
03-14-1997	GAVILAN, ESPERANZA	MOTHER	1
03-14-1997	SANCHEZ, ISAURA	SPOUSE, WIFE	0
03-16-1997	SANCHEZ, ISAURA	SPOUSE, WIFE	0
03-16-1997	GAVILAN, ESPERANZA	MOTHER	1

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	:	Case No. 95-CR-421-1-NESBITT
Plaintiff/Respondent,	:	99-1445-CV-NESBITT
v.	:	Magistrate Judge Simonton
AGUSTIN SANCHEZ,	:	
Defendant/Petitioner.	:	

MOTION TO EXPAND THE RECORD OF SECTION 2255 PROCEEDINGS

COMES NOW the Defendant, AGUSTIN SANCHEZ, by and through his undersigned counsel and hereby respectfully moves this Honorable Court to expand the record in these Section 2255 proceedings based upon the interests of fairness and justice pursuant to Rules Governing Section 2255 Proceedings, 28 U.S.C. §2255, Rule 7. In support thereto, Defendant avers:

1. Crucial to the factual findings contained within the Magistrate's Report and Recommendation (and this Honorable Court's review) is testimonial evidence provided by Jeanette Montenegro, legal secretary and translator for Samuel Rabin, Esq., trial counsel for the Defendant. The Defendant seeks the opportunity to supplement the record with the official records of the Federal Detention Center in Miami, Florida. A copy of those records for the pertinent time period is appended hereto

as Exhibit A. Those records either call into question or specifically repudiate Montenegro's testimony and affidavit in opposition to these Section 2255 proceedings.

2. The specific issues before this court are: whether (1) defense counsel was ineffective because he affirmatively misrepresented the sentence which the defendant faced upon conviction, and (3) [sic] whether defense counsel was ineffective because he failed to seek a stay of the second trial in order to file an interlocutory appeal of the district court's denial of the Double Jeopardy Clause based dismissal motion.

3. In the context of the first issue, the records of the FDC Miami specifically dispute, in a material fashion, the facts set forth in that witnesses' affidavit concerning meetings with Sanchez during the crucial time period between mistrial (7/11/96) and retrial (7/30/96). See *United States v. Sanchez*, Affidavit of Jeanette Montenegro, ¶3 ("On more than one (1) occasion Affiant participated in meetings between Mr. Sanchez and Mr. Rabin concerning the government's plea offer. Affiant distinctly recalls translating to Mr. Sanchez Mr. Rabin's suggestion that he seriously consider taking the plea because if he (Sanchez) went to trial and was found guilty by the jury, he would receive a life sentence.") The records of the FDC Miami reflect that Jeanette Montenegro never accompanied lawyer Sabin [sic] during post-mistrial but pre-retrial meetings with Sanchez. This is the crucial time period at issue since the Defendant claims that Rabin did not definitively advise that life sentence would result upon conviction. This is the period of time that the government tendered a reasonable plea offer, subsequent to this court's ruling that a *Brady* violation occurred.

4. In relevant part, Sanchez Section 2255 petition claims,

> After telephonically describing the general terms of the plea agreement to the Defendant, defense counsel traveled to the FDC to meet with Sanchez, and reviewed the government's offer. See, Affidavit of Agustin Sanchez. However, defense counsel did not accurately recount to Sanchez the probability or possibility of receiving a life sentence under the sentencing guidelines in the event he chose to decline the prosecution's offer, try his case, and lose. See, Affidavit of Agustin Sanchez. . . . Defendant's decision to refuse the prosecution's plea offer was based, at least in substantial part, upon trial counsel's failure to describe life imprisonment as the punishment which would otherwise be imposed upon conviction. Defense counsel well recognized the extraordinary likelihood of conviction. Therefore, this collateral attack is premised upon the claims that the Defendant received ineffective assistance of counsel in the plea bargaining context of these proceedings as a consequence of trial counsel's, (1) failure to explain to the Defendant that he was facing life imprisonment under the Sentencing Guidelines upon conviction, rather than twenty or so years . . .

See *United States v. Sanchez, Memorandum Brief in Support of Petition to Vacate Sentence Filed Pursuant to 28 U.S.C.* §2255, pp. 5-7.

5. Because Rabin does not speak Spanish, there is no way he could have conveyed his impression concerning the government's plea offer independently. Rabin testimony and evidentiary makes clear that he relied

upon Jeanette Montenegro for translation purposes. See *Sanchez v United States*, Transcript of Motion on Evidentiary Hearing, p. 63.

6. According to Mr. Rabin's testimony, he conveyed the government's plea offer to Sanchez, in person, not by writing, notwithstanding its importance. *Id* at pp. 80-81.

7. In considering whether it is appropriate, just, and fair to allow expansion of the record with the official records of the FDC Miami, review of Montenegro's testimony at evidentiary hearing is appropriate.

> [Defense Counsel] Now do you recall whether you ever traffic [traveled] to the jail to meet with Mr. Sanchez after that mistrial was granted?
>
> [Answer] Oh Yes.
>
> [Defense Counsel] After the mistrial did you travel to the jail with Mr. Rabin?
>
> [Answer] Yes sir.
>
> [Defense Counsel] That is when he explained to him about the possibility of life imprisonment?
>
> [Answer] I can't remember sir. I apologize.

United States v. Sanchez, Transcript of Evidentiary hearing, pp. 108- 109.

8. Case law and the Rules Governing Habeas Corpus Cases recognize that courts may expand the record for considering section 2255 motions with discovery and documentary evidence. *Blackledge v. Allison*, 431 U.S. 63, 81-83 (1977) (citing Rules Governing Habeas Corpus Cases); *Farrow v. United States*, 580 F.2d 1339,

1352-53 (9th Cir.1978). Judges may also supplement the record with their own notes and recollections of the plea hearing. *Abatino v. United States*, 750 F.2d 1442, 1444 (9th Cir.1985); See Rules Governing Section 2255 Proceedings, 28 U.S.C. full. §2255, Rule 7; *Watts v. United States*, 841 F.2d 275, 277 (9th Cir.1988) (per curiam) (courts considering section 2255 motions may expand the record with discovery and documentary evidence).

WHEREFORE, the Defendant respectfully request [sic] the record of his Section 2255 proceedings be accordingly expanded.

Respectfully submitted,

By: _____

NEIL M. SCHUSTER
Florida Bar No. 216909
407 Lincoln Road, Suite 11-B
Miami Beach, FL 33139
(305) 673-3737
Fax: (305) 534-5470

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail this ___ day of August, 2000 to Richard E. Byrne, AUSA, Office of the United States Attorney, 8245 N.W. 53rd St., Miami, FL 33166.

By: _____
Neil M. Schuster

TOTAL VISIT(S) FOR THIS INMATE: 128

DATE: 07-26-2000 FDC MIAMI PAGE: 1

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VISITING HISTORY FOR INMATE NAME:
SANCHEZ, AGUSTIN
REGISTER NUMBER: 44031-004
DATES: 05-03-1996 – 03-18-1997

==========

[Reproduced, *supra*, at pages J-6 – J-13]

APPENDIX L

To : Mr. Neil M. Schuster, Attorney at Law
407 Lincoln Road, Suite 11-B
Miami Beach, Florida 33139

FROM: Agustin Sanchez
Reg. No. 44031-004
P.O. Box 33
Terre Haute, Indiana 47808

July 6, 2001

Dear Mr. Schuster:

After speaking with you yesterday, I have undertaken the task of copying the documents you requested, and in this letter, I will try to explain to you why I believe the Court erred in crediting the testimony of Attorney Mr. Rabin's secretary Jeanette Montenegro to the effect that she interpreted for Mr. Rabin to me that I faced a life sentence if convicted at trial and therefore should accept a plea bargain of eleven years. Similarly I believe the court erred in adopting the R and R of the Magistrate concluding that the difference between 20-25 years and Life imprisonment in my case was not ineffective assistance of counsel.

The Magistrate's R and R adopted by the District Court May 1, 2001, that the difference between 20-25 years imprisonment as opposed to Life imprisonment did not amoount [sic] to ineffective assistance of counsel given my age at the time of 53 years old. (See R&R pp. 13-16, attached as Exhibit "A"). The Magistrate's R&R in this regard, and the Judge's Order adopting it was plain-error in light of the Supreme Court's holding in *Glover v. U.S.*, 531 U.S. ___, 148 L.Ed 2d 604 (1/9/2001).

The factual findings of the Magistrate that Jeanette Montenegro corroborated Attorney Rabin's testimony that he always explained and reviewed the guidelines, is incredible as a matter of law.

> "Testimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature." *U.S. v. Gadison*, 8 F.3d 186, at 190 (5th Cir. 1993); *U.S. v. Hoskins*, 628 F.2d 295, 297 (5th Cir.), cert. denied 449 U.S 987, 101 S.Ct. 406, 66 L.Ed.2d 249 (1980).

On page 6 of your "Motion for Issuance of Certificate of Appealability . . . " you state counsel's secretary, Jeanette Montenegro related to me the possibility of a Life sentence if I proceeded to trial instead of taking the Plea Agreement. I suppose you are relying on the R&R. However, I believe such reliance is incredible.

Jeanette Montenegro prepared an affidavit (Exhibit "B") swearing that Mr. Rabin suggested at meetings between Rabind and I, that I would receive a life sentence if I didn't take the Plea offer.

At the evidentiary hearing Jeanette Montenegro testified that:

1.) She was present at a meeting (either in the office oraat the jail (FDC) wherein Rabin discussed the government's plea offer); and Rabin attempted to convince me to take the plea offer; and Rabin told me if I rejected the plea offer I was facing the possibility of a life sentence.

2.) She came to the jail with Rabin on numeroous [sic] occasions to translate for Rabin concerning plea offer.

(See Exhibit "C").

Jeanette Montenegro's Affidavit and evidentiary hearing testimony was incredible as a matter of law because she never came to the jail (FDC) after the mistrial and before the second trial, which is the critical period in which the plea offer was discussed. See the U.S. Bureau of Prisons "Visiting History" for me which shows she was never there (Exhibit "D"). I was in jail, therefore I coould [sic] not have come to the office. Therefore, her testimony that she was present at a meeting at either the jail or office where Rabin said I faced the possibility of Life in prison if I didn't take the plea offer is incredible because it relates to facts that she could not have possibly have observed or to events which could not have occurred under the laws of nature, and, therefore, incredible as a matter of law.

On the other hand, my testimony of the events regarding the Plea offer and double jeopardy motion is supported by substantial evidence. The Court, I believe, made a clearly erroneous factual finding in rejecting my testimony and crediting Rabin, Montenegro, and Casabielle.

You filed my affidavit in support of the 2255 Motion (See Exhibit "E"), and I testified at the evidentiary hearing (See evidentiary hearing transcript "Exhibit "F" pp. 18-58). Likewise Mr. Rabin submitted his Affidavit (Exhibit "G") and testified at the evidentiary hearing (Exhibit "F" pp. 59-89). Mr. Casabielle submitted his affidavit (Exhibit "H") and testified at the evidentiary hearing (Exhibit "F" pp. 89-105). Jeanette Montenegro submitted her affidavit (Exhibit "B") and testified at the

evidentiary hearing (Exhibit "F" pp. 105-110). In rebuttal my wife testified (Exhibit "F" pp. 113-116). On August 14, 2000, you filed a Motion to Expand the Record to included the FDC's Visiting Record (Exhibit "I").

I avered and testified that at no time did Mr. Rabin or Mr. Casabielle ever tell me I faced a penalty of Life imprisonment; they told me 20-25 years because of offense level 38, during a Plea Offer meeting the weekend before the 2nd trial began. Mr. Rabin avered he had no specific recollection of reviewing the guidelines with me, but knows he did based on his custom and practice (Exhibit "G"), and testified he couldn't remember going over my exposure but told me I'd die in prison if I didn't take the Plea Offer, however he testified he had to express these communications through Interpreters: Attorney Casabielle or Jeanette Montenegro because he didn't speak Spanish.

When the Court was deciding the merits of my motion and the credibility of the witnesses, the Court was in a unique position. On the 14th of May 2000, you moved to expand the record and provided the Court with the U.S. Bureau of Prisons "Visiting Record." This record allowed the Court to compare the testimony of Rabin, Casabielle, and Montenegro with my testimony and with our respective Affidavits and resolve conflicts as to when and if Rabin, Casabielle, and Montenegro came to the Jail (FDC) to visit with me. The "Visiting Record" (Exhibit "I") validates my testimony and contradicts Montenegro's Affidavit and Testimony, which should have led the Court to adopt my version of the facts:

Point #1. Three or four days after mistrial Rabin came with the Investigator to talk about the Double Jeopardy Motion (See my Affidavit p. 2 para. 5, Exhibit "E"; and hearing testimony Exhibit "F" pp. 20-22). Rabin's memore [sic] could not allow him to recall exactly but he did discuss the Double Jeopardy Motion with me (Exhibit "F" p. 66). Rabin always used an interpreter to speak to me; either Montenegro, investigator Fred Salazar, or Casabielle (Exhibit "F" p. 63). Looking at the "Visiting Record" (Exhibit "I") it shows July 14, 1996 that Rabin and Salazar visited me.

Point #2. I avered and testified: about July 18, 1996, (Affidavit Exhibit "E") a couple days after the Double Jeopardy Motion was filed, Mr. Casabielle came to see me by himself and discussed the Double Jeopardy Motion. (Exhibit "F" p.24). Casabielle doesn't recall (Exhibit "F" p.94). Looking at the visiting record (Exhibit "I") it shows Casabielle visited me by himself on July 23, 1996, substantiating my recollection.

Point #3. I avered and testified: about July 26th-27th, 1996, that I telephoned Rabin's Office and talked to Jeanette Montenegro who told me Rabin was on the phone with the prosecutor discussing a Plea Agreement (Exhibit "E" p. 2 para. 7) (Exhibit "F" pg.26). Half an hour later I called back Rabin and Montenegro were on the line and they explained the government was offering a nine year deal which would break down: starting at Level 38 with ā six level reduction for Acceptance of Responsibility and safety valve resulting in an Offense Level 32 Category I range of 121-157 months, and the government would agree to dismiss the cocaine charges. I didn't understand the plea offer and asked Mr. Rabin to come to

the jail and explain it; Rabin went to call Casabielle, and Montenegro continued to talk to me and told me this was a good deal but she *never* said anything about Life in prison or enhancements. (Exhibit "E" page 2-3 para. 7) and (Exhibit "F" pp. 27-29).

The following day, July 26, 1996, Mr. Rabin and Mr. Casabielle came to the jail and told me the plea offer was a good deal but the deal had changed from 9 years to 10 to 12 years. I asked what was I facing if I went to trial and Rabin said 20-25 years. Neither Rabin or Casabielle ever discussed sentencing guideline enhancements or go over the Sentencing Guideline Manual. (Exhibit "E" pp. 3-4) and (Exhibit "F" pp. 29-34). If I had known I faced Life I would have taken the Plea Offer (Exhibit "E" pp. 4 para.10) and (Exhibit "F" p.34). I had three meetings as described in Points 1-3 (Exhibit "F" p. 35-36) and the "Visiting Record" corroborates that (Exhibit "I") visit on July 26, 1996.

Rabin avered he has no specific recollection of reviewing the Federal Sentencing Guidelines with me but knows he did based on his custom and practice (Affidavit, Exhibit "G" p. 2 para.5) and testified to the same saying he told me I would die in jail if I didn't take the plea offer (Exhibit "F" p. 64-69). The first time he conveyed it to me was face to face (Exhibit "F" p. 80). He doesn't remember discussing obstruction of justice or a gun or leadership enhancement with me (Exhibit "F" p. 84). The fact is Rabin was misleading me or the government was misleading him, because Rabin could not have gotten the plea offer of 9-12 years applying the enhancements. He starts at level 38 in the Plea Offer which holds

a 20-25 year penalty for a Criminal History Level I defendant, then departs downward 6 levels for acceptance of responsibility and the safety valve. If he was considering the enhancements he says he did he would have started at Level 44 or higher and never could have achieved the 9-12 years Level 32 deal he was telling me to take. Therefore his testimony is incredible as a matter of law. Level 38 is where we started 20-25 years.

Likewise Casabielle avers he believes the sentencing guidelines were discussed and that he told me I would not get out of jail (Exhibit "H" p.2). Casabielle testified his custom and practice is to go over the sentencing guidelines with all clients (Exhibit "F" p.91). Casabielle has no recollection of going over the sentencing guidelines with me before the first trial (Exhibit "F" p.93). Casabielle recalls the plea offer meeting between Rabin, me and him, and the offer being eleven years and telling me if I didn't take the plea, I wouldn't get out of jail (Exhibit "F" pp.95-96). He doesn't have a clear recollection of telling me "Life Sentence" (Exhibit "F" p. 97). Casabielle interpreted for Rabin, so whatever Rabin said Casabielle interpreted for him to me (Exhibit "F" p.99). While he states he understood I faced a Life Sentence, he cannot reconcile that with starting at level 38 and the 6 level downward departure to achieve the Plea Offer. He would have had to have been departing from a 20-25 year sentence I would receive if I didn't take the deal.

Jeanette Montenegro's testimony should have been completely thrown out – she lied and said she interpreted in person the plea offer to me and said Rabin told me I faced life in prison if convicted by jury and that she translated this to me in person at the jail or in the office.

It never happened. The visiting record clearly shows she never came to the jail (Exhibit "I"), and my wife's testimony clearly contradicts her.

For the above reasons the R&R of the Magistrate and the Judge must be a clearly erroneous factual finding because:

1. The difference between 20-25 years and Life Imprisonment must be disproportionate enough to support an ineffective assistance claim. *Glover v. U.S.*, 148 L.Ed.2d 604 (2001).

2. Jeanette Montenegro's testimony is incredible as a matter of law, and

3. Finding Rabin, Casabielle, and Montenegro conveyed to me that I was facing life imprisonment is incredible considering they explained the plea offer starting at Level 38 which holds 20-25 year imprisonment penalty for a level I defendant. If they had considered enhancements the starting Level would have had to have been at least 44 and the 6 level reduction could not have achieved Level 32's 9-12 year range.

Please, consider the foregoing and incorporate it into the COA by amendment or supplement. This is my Life and you know I'm telling the truth. Please!!

Thank you for your kind consideration and help. I know you'll make this even better. Please send a copy of this letter to my wife, Isaura Sanchez, so the BOP doesn't read it, OK!?

Sincerely,

P.S. We are currently on a lock down so I'm unable to make copies of the exhibits. Please make copies of them for me and send them back to me as soon as possible. Thank you.

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NOS.: 99-1455-CIV-NEBITT/HIGHSMITH
94-421-CR-NESBITT/HIGHSMITH

AUGUSTIN SANCHEZ,
(Prisoner #44031-004)
Petitioner,

vs.

UNITED STATES
OF AMERICA,

Respondent.
_____/

MOTION FOR LEAVE TO SUPPLEMENT APPLICATION FOR CERTIFICATE OF APPEALABILITY

COMES NOW, the Petitioner, AUGUSTINE SÁNCHEZ, by and through his undersigned counsel and hereby respectfully moves this Honorable Court to enter an order allowing him to supplement his application for Certificate of Appealability. In support thereto, Petitioner avers:

1. The undersigned counsel prepared the Application for Certificate of Appealability prior to reviewing the draft petition with Sanchez, who is serving a life sentence. After Sanchez received the petition, he advised counsel of matters which require that a supplement be filed. A copy of the proposed supplement is filed simultaneously hereto.

2. The undersigned has called AUSA Byrne to discuss this motion but AUSA is out of the Office.

WHEREFORE, Petitioner respectfully prays that this Honorable Court enter an order permitting him to supplement his Application for Certificate of Appealability.

Respectfully submitted,

By: /s/ Neil M. Schuster
NEIL M. SCHUSTER
Florida Bar No. 216909
407 Lincoln Road, Suite 11-B
Miami Beach, FL 33139
(305) 673-3737
Fax: (305) 534-5470

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by fax and mail this 17 day of July, 2001 to Richard E. Byrne, AUSA, Office of the United States Attorney, 99 N.E. 4th St., Miami, FL 33132.

By: /s/ Neil M. Schuster
Neil M. Schuster

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NOS. 99-1455-CIV-NESBITT/HIGHSMITH
95-421-CR-NESBITT/HIGHSMITH

AUGUSTIN SANCHEZ,
(Prisoner #44031-004)
Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

SUPPLEMENT TO MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY WITH INCORPORATED MEMORANDUM OF LAW

PETITIONER, Augustin Sanchez, hereby files this, his Supplement to Motion for Issuance of Certificate of Appealability with Incorporated Memorandum of Law. As reasons and grounds therefore, Petitioner states:

1. Petitioner timely filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255. That motion was denied by final order dated May 1, 2001.

2. Petitioner timely filed a Motion for Issuance of Certificate of Appealability with Incorporated Memorandum of Law.

3. After further communication with the undersigned counsel, Petitioner has provided counsel with additional information which supports his legal position in the application and therefore makes "a substantial

showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were " 'adequate to deserve encouragement to, proceed further.' " *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *quoting, Barefoot v. Estelle*, 463 U.S 880, 893 (1983).

4. Petitioner files this Supplement to make the Court aware of that information and to assist in making an informed decision.

5. Petitioner has previously filed a statement of the facts and re-alleges those facts for the purposes of this Supplement.

BACKGROUND

A. Conclusions Regarding the Credibility of Witnesses

At the evidentiary hearing on Petitioner's section 2255 motion, trial counsel Samuel Rabin's secretary, Jeanette Montenegro, generally corroborated the testimony of Rabin with her own testimony. Magistrate Judge Simonton accepted the testimony of Montenegro as credible and rejected Petitioner's testimony to the contrary as not credible. *See, Report and Recommendation* ("R & R") at 5, fn 3. Many, if not all, of the conclusions in the R & R are based on accepting the testimony of the government's witnesses as credible, which rejecting Petitioner's testimony even though there is strong reason to doubt the credibility of the government's witnesses.

The R & R also credits the testimony of Petitioner's trial attorneys regarding how and what they advised Petitioner concerning the federal sentencing guidelines and Petitioner's potential sentence. The hearing testimony clearly establishes that Petitioner's counsel had no independent recollection of reviewing the sentencing guidelines with Petitioner or discussing possible enhancements to Petitioner's base offense level. On the other hand, Petitioner very specifically recalled meetings with his attorneys and testified that his attorneys did not discuss the guidelines or possible enhancements with him. Petitioner's testimony is corroborated by other evidence. Therefore, crediting the testimony of Mr. Rabin and Mr. Casabielle, who did not have specific recollections of meetings with Petitioner, while rejecting the testimony of Petitioner, amounted to error.

B. Conclusions Regarding Trial Counsels' Sentencing Advice to Petitioner

The R & R further found that even if Petitioner's trial counsel erroneously informed him that he would face 20 to 25 years in prison after trial, such an error in the calculation of the sentence to be imposed does not render counsels' performance deficient because "the difference between 20 to 25 years and life imprisonment to Sanchez, a man in his mid-fifties, is much less than the difference between 15 to 22 years and life imprisonment to a man in his mid-forties." *Report and Recommendation* at 16, distinguishing *United States v. Gaviria*, 116 F.3d 1498 (D.C. Cir. 1997). As discussed in part in Petitioner's Motion for

Issuance of Certificate of Appealability and further elaborated herein, the above statement from the R & R is inconsistent with the law.

I.

ARGUMENT

Petitioner has made a substantial showing of the denial of a constitutional right, a claim erroneously, rejected, because the Court relied on the testimony of Jeanette Montenegro, which was incredible as a matter of law.

As previously noted, the Court found the testimony of Jeanette Montenegro to be credible while discrediting the testimony of Petitioner. It was error to credit Montenegro's testimony because the testimony was unbelievable on its face and related to "facts that [the witness] physically could not have possibly observed or events that could not have possibly occurred under the laws of nature." *United States v. Steele*, 178 F.3d 1320, 1236 (11th Cir. 1999), *quoting*, *United States v. Calderon*, 127 F.3d 1314, 1325 (11th Cir. 1997) (internal quotation marks and citation omitted). Montenegro was asked if she traveled to the jail with Mr. Rabin after the mistrial to meet with Petitioner Sanchez. She answered unequivocally, "Yes, sir." Section 2255 *Hearing Transcript*, at pp. 108-9. However, the Visiting History for Petitioner while he was at the FDC in Miami does not contain Montenegro on its list of visitors. Therefore, Montenegro clearly related events that could not have occurred before her and her testimony was incredible as a matter of law. *See, Steele*, 178 F.3d at 1236.

The fact that Montenegro's testimony directly contradicted Petitioner's testimony was a basis for rejecting Petitioner's testimony. *See, R & R*, at 5, fn 3; *R & R*, at 8, fn 5. Since Montenegro's testimony was incredible as a matter of law and Petitioner's testimony was supported by substantial evidence, there is no sufficient basis to completely disregard Petitioner's testimony concerning what his attorneys communicated to him. This is especially true because neither of, Petitioner's two trial counsel had any specific recollection of the events in question. On the other hand, Petitioner had clear recollections of the same events.

There are several other instances in which the undisputed facts support the testimony of Petitioner. However, that testimony is rejected in the R & R. Petitioner recalled Mr. Rabin's visiting with him at the FDC, accompanied by an investigator, about three or four days after the mistrial in order to discuss a motion to dismiss the indictment. *Affidavit of Agustin Sanchez* at 2, *Hearing Transcript* at pp. 20-22. Mr. Rabin testified that he had no independent recollection of specific meetings with Petitioner. *Hearing Transcript* at pp. 79-80, 83-86. Although Petitioner did not correctly recall the exact date of the meeting, his Visiting History from the FDC is consistent with his testimony as it shows that Samuel Rabin and Alfred Salazar, the investigator, visited Petitioner on 14 July 1996. *See Visiting History*. Petitioner also testified that Mr. Casabielle visited him at the FDC a couple of days after the (Double Jeopardy based) Motion to Dismiss was filed in order to discuss the likelihood of success. *Affidavit of Agustin Sanchez* at p. 2; *Hearing Transcript* at p. 24. Mr. Casabielle's recollection of the meeting was not very clear. Section

2255 *Hearing Transcript* at p. 94. Again, the Visiting History is consistent with Petitioner's testimony, even though Petitioner did not recall the date of the meeting with exactitude.

Petitioner's recollection of another meeting was quite clear as well. He testified that he called Mr. Rabin's office on 27 July and discussed a plea offer with Rabin. Petitioner did not fully understand the offer and asked Rabin to come to the jail to explain it. Rabin went to the FDC the following day with Casabielle to meet with Petitioner and explain the terms of the offer. *Affidavit of Agustin Sanchez* at 2-3; *Hearing Transcript* at pp. 29-34. The Visiting History shows that both Mr. Casabielle and Mr. Rabin visited Petitioner on 26 July 1996.

The fact that Petitioner clearly remembered meetings with his trial attorneys and that his testimony was corroborated by undisputed evidence are disregarded within the R & R. Because of the corroborating evidence, the Application for Certificate of Appealability is further supported. Instead, the R & R disbelieves Petitioner's testimony regarding the substance of conversations with his attorneys even though his attorneys had no specific recollection of the meetings. Petitioner's accurate memory of the meetings is evidence that he remembered what transpired during those meetings. No one has contradicted Petitioner's testimony with credible testimony. Therefore, because it was error to reject the detailed, corroborated testimony of Petitioner in favor of vague recollections and statements of the customs and practices of Petitioner's attorneys.

II.

Petitioner has made a substantial showing of the denial of his Sixth Amendment Right to effective assistance of counsel, a constitutional right in that there is strong evidence that his attorneys did not discuss possible sentencing enhancements with him, thereby enabling him to make an informed decision regarding the plea offer.

Mr. Rabin testified that he had no specific recollection of reviewing the Federal Sentencing Guidelines with Petitioner, but that it was his custom to review guidelines with his clients. Section 2255 *Hearing Transcript*, pp. 64-69. Rabin also had no recollection of discussing obstruction of justice, use of a firearm, or leadership role enhancements with Petitioner. Section 2255 *Hearing Transcript*, P. 84. Considering the plea offer, it is not possible that Rabin noted the possible enhancements or that he had discussed them with Petitioner. Rabin could not have received a plea offer of 9 to 12 Years if he applied the enhancements because he started with Petitioner's base offense level, 38 (requiring a 20 to 25 year sentence) and departed downward 6 levels for acceptance of responsibility and safety valve. Had Rabin considered the enhancements, he would have started with an offense level of 44 and could not have achieved the level 32 offer of 9 to 12 years. Given the circumstances, it is impossible that Rabin discussed the enhancements with Petitioner or considered them in plea negotiations. Therefore, Rabin's testimony regarding these matters also seems to fall into the category of impossibility discussed in *Steele, supra*, while the testimony of Petitioner regarding meetings with his attorneys is supported by other evidence, as discussed above.

III.

Petitioner has made a substantial showing of the denial of a constitutional right because the lack of advice to Petitioner regarding sentencing made it impossible for Petitioner to make an informed decision regarding the plea offer and the Court did not apply the proper standard in determining that the advice in this case could not possibly amount to ineffective assistance of counsel.

Petitioner states in his original Application that the reasoning used within the R & R – concluding defense counsels' advice (regarding prison terms) was not deficient, was erroneous. Petitioner believes that reasoning, a finding that trial counsel was not deficient in their performance given the circumstances, is plain error. Additional jail time, even for a man in his mid-fifties, caused by the difference between a life sentence and another sentence, notwithstanding the age of the defendant, raises serious constitutional issues. "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198, 203 (2001).

The Court in *Glover* held that the Seventh Circuit erred in attaching a new "significant" standard to the familiar prejudice prong of the *Strickland* test. *Glover*, 531 U.S. at 204. The Seventh Circuit affirmed a denial of a motion to correct sentence filed by a defendant who received a sentence that was excessive by between 6 to 21 months. The petitioner believed it was ineffective assistance of counsel that caused him to receive the more

severe sentence, but the Seventh Circuit affirmed the denial of the motion because, in its view, 6 to 21 months was not significant enough to constitute prejudice in order to establish ineffective assistance. The Supreme Court rejected the reasoning noting: "We hold that the Seventh Circuit erred in engrafting this additional requirement onto the prejudice branch of the *Strickland* test." *Glover*, 531 U.S. at 204.

In the instant case, Petitioner bases this ineffective assistance of counsel claim on his counsels' failure to adequately inform him of the sentence he was facing if convicted after trial. Petitioner has put forth evidence that proves it should have been clear to his attorneys that he was facing life in prison if he went to trial. Petitioner's trial attorneys claim advising him that he was facing 20 to 25 years based on his base offense level of 38. As a result, Petitioner was only able to weigh the plea offer against that sentence and not against a life sentence. Had Petitioner known that he was probably facing a life sentence, he would have accepted the plea offer. *Affidavit of Agustin Sanchez* at 4. Therefore, because of ineffective assistance of counsel, Petitioner received a life sentence instead of the 10 to 12½ years he would have served if he had accepted the plea offer.

In addition, assuming the R & R is correct in using the difference between the sentence which Petitioner was advised he would get if convicted after trial (20 to 25 years) and the sentence actually imposed after trial (life imprisonment), the R & R errs in assuming that the two sentences are no different for a man in his mid-fifties. Since "any amount of actual jail time has Sixth Amendment significance," *Glover*, 531 U.S. at 203, it is wrong to

assume that a man in his mid-fifties will not survive to be released after a 20 to 25 year sentence. According to *Glover*, a man in such a situation would not need to survive the 20 to 25 year sentence by many days in order to have a situation that established prejudice.

CONCLUSION

The Defendant respectfully supplements his Application for Certificate of Appealability and prays that this Court enter an order granting a Certificate of Appealability based upon the grounds asserted herein.

Respectfully submitted,

By: /s/ Neil M. Schuster
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Florida Bar No. 216909
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(305) 673-3737
Fax: (305) 534-5470

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by fax and mail this 17th day of July, 2001 to Richard E. Byrne, AUSA, Office of the United States Attorney, 8245 N.W. 53rd St., Miami, FL 33166.

By: /s/ Neil M. Schuster
Neil M. Schuster

APPENDIX N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,
Plaintiff,
v.
AGUSTIN SANCHEZ,
Defendant.
_____/

Case No. 95-CR-421-1-NESBITT/HIGHSMITH
Magistrate Judge Simonton

ORDER GRANTING MOTION FOR LEAVE TO SUPPLEMENT APPLICATION FOR CERTIFICATE OF APPEALABILITY

(Filed Aug. 2, 2001)

THIS MATTER having come before the Court for consideration of Defendant's motion for leave to supplement application for certificate of appealability. For good cause shown, it is, hereby

ORDERED AND ADJUDGED that Defendant's motion is granted.

DONE AND ORDERED this 2 day of ~~July~~ August 2001 in Chambers at Miami, Florida.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
U.S. District Judge

cc: Richard Bryne, AUSA
Neil M. Schuster

APPENDIX O

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 01-1445-EE

AUGUSTIN SANCHEZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON DIRECT APPEAL FROM THE UNITED STATES

(PARTIAL DENIAL OF MOTION
FOR CERTIFICAT [sic] OF APPEALABILITY)

DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CIVIL APPEAL

MOTION AND APPENDIX EXCERPTS IN SUPPORT
OF MOTION TO EXPAND
CERTIFICATE OF APPEALABILITY

Respectfully submitted,

Neil M. Schuster
(Fla. Bar No. 216909)
407 Lincoln Road, Suite 11B
Miami Beach, FL 33139
Telephone: (305) 673-3737

PETITIONER, Augustin Sanchez, respectfully moves this Honorable Court pursuant to 28 U.S.C. § 2253

(c)(1)(B) for expansion of the Certificate of Appealability (COA). As reasons and grounds therefore, Petitioner states:

1. Petitioner filed a timely motion to vacate sentence under 28 U.S.C. § 2255. That motion was denied by final order dated May 1, 2001. The Antiterrorism and Effective Death Penalty Act (AEDPA) amended 28 U.S.C. § 2253 to require a petitioner to request a certificate of appealability ("COA"). See *Henry v. Department of Corrections*, 197 F.3d 1361, 1364-66 (11th Cir.1999) (describing statutory history), and established a statutory standard, set out in section 2253(c)(2), for the issuance of a COA. See 28 U.S.C. § 2253(c)(2) (Supp. IV 1999).

2. Petitioner subsequently timely filed before the district court a motion (with supplement) for issuance of certificate of appealability. That motion was denied in part by final order dated August 3, 2001.

3. "AEDPA" also permits circuit court judges to issue a COA.

4. Petitioner respectfully invites this Honorable Court to find that he has made "a substantial showing of the denial of a constitutional right, a demonstration that under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were " 'adequate to deserve encouragement to proceed further.' " " *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *quoting, Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

5. Although granting a COA on the *Apprendi* matter[1], the Petitioner respectfully invites this Court to find that he has also made a substantial showing of the denial of his constitutional rights with respect to one or both of the following issues:

> Whether the Petitioner's Sixth Amendment right to effective assistance of counsel was violated as a result of trial counsel's failure [sic] explain that Petitioner would certainly receive a life sentence if convicted under the sentencing guidelines rather lesser punishment.
>
> Whether the Petitioner's Sixth Amendment right to effective assistance of counsel was violated as a result of trial counsel's failure to seek a stay of the second trial or file an interlocutory appeal to the trial court's denial of the double jeopardy motion to either improve the Petitioner's plea bargaining posture or delay resolution of an otherwise improvident decision to refuse the government's plea offer.

6. The following evidence and law support a finding that the Petitioner has made a substantial showing of the denial of a constitutional right under the *Slack* standard. Petitioner respectfully invites this Court to conclude that the cited issues raised in Petitioner's Section 2255 petition are appealable.

I. PROCEDURAL BACKGROUND

The Petitioner's indictment charges five drug importation and distribution offenses. The Petitioner was tried

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[1] See *Apprendi v, New Jersey*, 120 S. Ct. 2348 (2000).

twice in this case. The first trial commenced in July 1996. A mistrial was ordered after the prosecution failed to comply with its disclosure obligation as set forth in both the Standing Discovery Order and as mandated by the Due Process Clause. See *United States v. Sanchez*, United States Court of Appeals for the Eleventh Circuit, Case No. 96-5540, Brief for the Appellant, pp. 24-29.

Prior to retrial, plea negotiations were unsuccessful and Petitioner filed a motion seeking dismissal of the indictment premised on the Double Jeopardy Clause of the Fifth Amendment. Petitioner claimed the mistrial was caused by intentional misconduct of the prosecutor. That motion was denied based on a finding that the prosecutor acted negligently and not willfully. No interlocutory appeal was filed, and no motion for stay was presented before the district or appellate courts.

Petitioner appeared for his second trial between July 30, and August 6, 1996. On August 6, 1996, Petitioner Sanchez was convicted on Counts 1-3 and 5, and was acquitted on Count 4. A life sentence was imposed on December 3, 1996.

The Petitioner exhausted his avenues of direct appeal. *See, United States v. Sanchez*, 132 F.3d 1460 (11th Cir. 1997), *cert. denied*, 523 U.S. 1139 (1998). He filed his Section 2255 petition in 1999. A final order denying relief was entered in May 2001. His motion for certificate of appealability was denied, in part, as to the two issues presented here. A notice of appeal was filed.

II. FACTUAL BACKGROUND OF SENTENCING AND POST MISTRIAL PLEA NEGOTIATION PROCEEDINGS

A. Facts Relating to Base Offense Level

As shown by the evidence at trial and the PSR, the bare minimum offense level without any adjustments, amounts to a Base Offense Level ("BOL") of 38. BOL 38 results because the offense involved more than six hundred (600) kilograms of cocaine, which is more than three times the one hundred fifty (150) kilograms required to establish that BOL. However because the offense also encompassed more than twenty-two thousand (22,000) pounds of marijuana, there was more than a sufficient basis to allow an upward departure from the guideline range. See Appendix, *U.S. v. Sanchez*, Case No. 95-0421-Cr-Nesbitt, S.D.Fl, PSI (original and revised) hereinafter "PSI App."

B. Facts Relating to Adjustments to Base Offense Level

1. Role in the Offense

Consideration of just a single government exhibit at trial, GX 31, establishes an indisputable factual basis for a four level role adjustment pursuant to the provisions of USSG §3B1.1(a). *See also*, AUSA Byrne's "role" related remarks at Sanchez' sentencing *Id;*, *United States v. Sanchez*, PSR, p. 10; *United States v Sanchez*, Tr. Sent Proc., pp. 24-31. Based on the evidence, a four level role adjustment, resulting in an Adjusted Base Offense Level ("ABOL") of 42, was a minimal foregone conclusion before considering other issues. Petitioner Sanchez was not advised by trial

counsel that he was facing a minimum ABOL of 42 that would result in a minimum sentence of 360 months-life even before matters concerning obstruction of justice or a co-defendant's possession of a weapon were considered. Trial counsel Rabin's testimony is consistent with Sanchez' allegation in this regard:

> Q. [Section 2255 Defense Counsel] So you don't remember whether you discussed role adjustment?
>
> A. [Trial Counsel] I don't remember exactly what I said to him.
>
> Q. And that would mean that would follow logically that you don't remember whether you discussed obstruction of justice as well with him?
>
> A. Again, I don't recall one way or the other.

United States v. Sanchez, Transcript of Section 2255 Hearing, Nov. 3, 1999, p. 84.

2. Obstruction of Justice

Prior to trial, the court found reason to and did revoke Petitioner's bond based on a violation of his conditions of release. As a result, there was no doubt that an additional two level adjustment beyond the aforementioned ABOL 42 would apply. PSI App. Petitioner's trial counsel should have known that Petitioner's ABOL would be 44 (resulting in a mandatory life sentence) based on the role adjustment and judicial determination that he obstructed justice.

Under the circumstances of the Base Offense Level 38 and adjustments applicable to the offense behavior, it was a certainty, *not merely a possibility*, as described at hearing by trial counsel Rabin's secretary and interpreter, Jeanette Montenegro, that Sanchez would receive a life sentence if his case were tried and the jury convicted him on any single count. *United States v. Sanchez*, Transcript of Section 2255 Hearing, Nov. 3, 1999, p. 107.

C. Facts Relating to the Plea Offer and Information Conveyed to Sanchez.

After the mistrial, the prosecution offered a plea agreement which would result in an imprisonment term of between 108 and 151 months. Petitioner's trial counsel described the general terms of the plea agreement to Sanchez and later met with Sanchez at the Federal Detention Center ("FDC") to review the government's offer. However, Sanchez' defense counsel did not accurately communicate to Sanchez the certainty of receiving a life sentence under the sentencing guidelines if Sanchez chose to decline the prosecution's offer, to try his case, and lost. Because Sanchez does not speak English and trial counsel Rabin does not speak Spanish, it was actually trial counsel's secretary, Jeanette Montenegro, who served as translator and who related to Sanchez the *possibility* of a life sentence. Trial counsel presented Sanchez with no written plea agreement and did not present Sanchez with recommendations in writing regarding the plea offer.

Petitioner's decision to refuse the prosecution's offer was based upon his trial counsel's failure to inform Petitioner that life imprisonment would be the punishment imposed if Sanchez decided to try his case and lost. Trial counsel Rabin and Casabielle both have testified that there was overwhelming evidence of Sanchez' guilt. Based on that testimony, trial counsel clearly recognized the extraordinary likelihood of conviction and should have recognized that a conviction after a trial would result in a life sentence.

D. Facts Relating to, Sanchez' Double Jeopardy Based Motion to Dismiss, Order Denying Relief and the Lack of an Interlocutory Appeal From its Denial.

Trial counsel admit they did not discuss with Sanchez the availability of seeking either an interlocutory appeal of District Judge Nesbitt's denial of the double jeopardy based motion to dismiss or a stay either before the district court or before the Circuit Court. Trial counsel informed Sanchez after the trial that the double jeopardy issue was a strong issue, but counsel did not seek an interlocutory appeal. The direct appeal affirmed Sanchez' conviction.

III. THE DISTRICT COURT MADE PLAINLY ERRONEOUS LEGAL AND FACTUAL CONCLUSIONS

A. Conclusions Regarding the Credibility of Witnesses

At the evidentiary hearing on Petitioner's section 2255 motion, trial counsel Samuel Rabin's secretary,

Jeanette Montenegro, generally corroborated the testimony of Rabin with her own testimony. Magistrate Judge Simonton accepted the testimony of Montenegro as credible and rejected Petitioner's testimony to the contrary as not credible. *See, Report and Recommendation* ("R & R") at 5, fn 3. Many, if not all, of the conclusions in the R & R are based on accepting the testimony of the government's witnesses as credible, while rejecting Petitioner's testimony even though there is objective and strong reason to doubt the credibility of the government's witnesses.

The R & R also credits the testimony of Petitioner's trial attorneys regarding how and what they advised Petitioner concerning the federal sentencing guidelines and Petitioner's potential sentence. However, review of the Section 2255 hearing testimony establishes that Petitioner's counsel had no independent recollection of reviewing the sentencing guidelines with Petitioner or discussing possible enhancements to Petitioners base offense level. On the other hand, Petitioner very specifically recalled meetings with his attorneys and testified that his attorneys did not discuss the guidelines or possible enhancements with him. Petitioner's testimony is corroborated by other evidence. Therefore, crediting the testimony of Mr. Rabin and Mr. Casabielle, who did not have specific recollections of meetings with Petitioner, while rejecting the testimony of Petitioner, amounts to plain error.

B. Legal Conclusions Regarding Trial Counsels' Sentencing Advice to Petitioner.

The underlying order finds that even if trial counsel erroneously informed Petitioner he would face 20 to 25 years in prison after trial, such error in the calculation of the sentence to be imposed does not render counsels' performance deficient because "the difference between 20 to 25 years and life imprisonment to Sanchez, a man in his mid-fifties, is much less than the difference between 15 to 22 years and life imprisonment to a man in his mid-forties." *Report and Recommendation* at 16, distinguishing *United States v. Gaviria*, 116 F.3d 1498 (D.C. Cir. 1997). The underlying order is contrary to the Supreme Court's ruling in *Glover v. United States*, 531 U.S. 198 (2001).

IV. ARGUMENT

A. Standard of Proof Necessary to Establish Sixth Amendment Violation.

In all instances where a *habeas* petitioner asserts ineffective assistance of counsel in connection with the determination to proceed to trial, rather than enter a guilty plea, the standard announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) and elaborated upon in *Hill v. Lockhart*, 474 U.S. 52 (1985) applies.

Sanchez' testimony, corroborated to some extent by trial counsel Rabin, reflects a willingness to plead guilty. Rabin's claim that Sanchez was "looking at" the possibility of life sentence *must be distinguished from its certainty*, under the guideline calculations clearly applicable under the facts of this case. Sanchez' decision to forego

pleading guilty, before his second trail [sic] is premised upon counsel's misadvise [sic]. This error serves to establish the more than colorable Sixth Amendment violation.

To satisfy the second prong of the *Strickland* test, prejudice in the context of discussing whether a guilty plea should enter, the petitioner must show that there is a reasonable probability that, but for counsel's errors the he or she would not have received the sentence which was ultimately imposed. See *Yordon v. Dussen*, 909 F.2d 474 (11th Cir. 1990); *U.S. v. Ford*, 918 F.2d 1343, 1350 (8th Cir. 1990); *Turner v. State of Tennessee*, 858 F.2d 1201 (6th Cir. 1988). The lower court's Order unfairly and ignores trial counsels limited admissions regarding equivocal advice.

B. Defense Counsel was Ineffective Because He Affirmatively Misrepresented the Sentence Which the Defendant Faced Upon Conviction.

Trial counsel Rabin testified that he had no specific recollection of reviewing the federal sentencing Guidelines with Petitioner, but that it was his custom to review guidelines with his clients. Section 2255 *Hearing Transcript*, pp. 64-69. Rabin also had no recollection of discussing obstruction of justice, use of a firearm, or leadership role enhancements with Petitioner. Section 2255 *Hearing Transcript*, p. 84. Considering the plea offer, it is not possible that Rabin noted the possible enhancements or that he had discussed them with Petitioner. Had Rabin considered sentencing enhancements, he would advise Sanchez he minimally started with an adjusted offense level of 44 and life imprisonment. Given the circumstances, it is impossible that Rabin discussed the

enhancements with Petitioner or considered them in plea negotiations. Therefore, Rabin's testimony regarding these matters supports Petitioner's claim.

Here, failure to advise Sanchez that he would receive a life term of imprisonment amounts to a Sixth Amendment violation under the Sentencing Guidelines in a situation where, (1) the trial was already previewed for four days and evidence of guilt was overwhelming, (2) a BOL of 38 was just the starting point, and (3) adjustments for leadership role and obstruction of justice resulting in life imprisonment were sure to follow.

A criminal defendant's Sixth Amendment right to effective assistance of counsel applies in the sentencing context. *Moore v. Zant*, 885 F.2d 1497, 1511 (11th Cir. 1989) (sentencing is a critical stage of the proceedings); *Backster v. Thomas*, 45 F.3d 1501, 1512-15 (11th Cir.) (Counsel ineffective when failed to investigate defendant's history or present relevant evidence at sentencing because defendant was prejudiced by this omission), *cert. denied*, 116 S. Ct. 385 (1995).

A criminal defendant can and should expect to receive from his counsel an accurate assessment of the time he faces in the event of conviction after trial as well as the likelihood of conviction. See, *Boria v. Keane*, 83 F.3d 48 53-54 (2nd Cir.) (Defendant prejudiced when counsel failed to advise defendant of improbability of acquittal and benefits of accepting guilty plea with reduced sentence because defendant's trial sentence was at least twice as long as plea time), *aff'd reh'g*, 90 F.3d 36 (1996). Here, Defendant Sanchez was entitled to rely upon his

lawyer to properly advise him of the most likely prospective sentence upon conviction after trial, in addition to what would be the most likely result of a guilty plea. *Turner v. State of Tennessee*, 858 F.2d 1205; *Johnson v. Duckworth*, 793 F.2d 898, 900-02 (7th Cir.) (A criminal defendant has the right to effective assistance of counsel in deciding whether to accept or reject the proposed plea agreement), *cert. denied*, 479 U.S. 937 (1986); *Beckham v. Wainwright*, 739 F.2d 262, 267 (5th Cir. 1981) (incompetent advice to withdraw or negotiate a guilty plea and instead stand trial violates defendant's right to effective assistance of counsel); *U.S. ex. rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3rd Cir. 1982) (" . . . the decision to reject the plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches."). Here, defense counsel should have specifically warned Sanchez he would receive life imprisonment under the sentencing guidelines upon conviction. See *Risher v. U.S.*, 992 F.2d 982, 983-984 (9th Cir. 1993) ("We hold that under these circumstances, a competent lawyer would have warned Risher of the significant risk that he would be sentenced under the . . . provisions of the Guidelines. A lawyer who failed to so advise his client cannot be said to have been functioning as counsel within the meaning of the Sixth Amendment.") Sanchez should have been advised to compare the certainty of a life sentence with a guilty plea, which at worst, would have resulted in 151 months imprisonment, given the government's sentencing concession. Trial counsel Casabielle, by his testimony, shows that Sanchez inadequately advised of the consequences of a conviction after a trial:

Q. [section 2255 Defense Counsel] So you don't have any specific recollection of discussing a four level sentencing adjustment, upward adjustment with Mr. Sanchez at the time you conveyed the government's plea offer to him? Do you recall? Do you?

A. At the time we spoke about the 11 years?

Q. Right.

A. No. I can't say that I recall today. No, I cannot say that.

United States v. Sanchez, Transcript of Section 2255 Hearing, p. 103.

An attorney must inform the client of all plea offers, but the client must also be provided with an informed opportunity to accept or reject those offers. *Diaz v. U.S.*, 930 F.2d 832, 834-5 (11th Cir. 1991). *U.S. v. Gaviria* notes,

> We think it quite likely that Gaviria would have accepted the plea offer. After all, fifteen to twenty-two years for a man in his mid-forties is significantly less than life imprisonment, and Gaviria himself admits that the prosecution's case against him was quite strong.

116 F.3d 1498, 1512-13 (D.C. Cir. 1997). Sanchez stands similar posture. He, too, like Gaviria, would have accepted the plea offer had he known life imprisonment was the only alternative. The court in *Gaviria* concluded there was a Sixth Amendment violation based on the difference between the plea offer and the sentence imposed after trial. In *Gaviria*, the difference was between 15 to 22 years and life. The Supreme Court resolved the

issue holding prejudice under Sixth Amendment standards in the imposition of any minimal additional prison time. *Glover v. United States*, 531 U.S. 198, 203 (2001).

C. Petitioner Has Made a Substantial Showing of the Denial of a Constitutional Right, a Claim Erroneously Rejected, Because the Court Relied on the Testimony of Jeanette Montenegro, Which Was Incredible as a Matter of Law.

As previously noted, while discrediting the testimony of Petitioner the court found the testimony of legal secretary, Jeanette Montenegro, to be credible. It was error to credit Montenegro's testimony because the testimony was unbelievable on its face and related to "facts that [the witness] physically could not have possibly observed or events that could not have possibly occurred under the laws of nature." *United States v. Steele*, 178 F.3d 1320, 1236 (11th Cir. 1999), *quoting*, *United States v. Calderon*, 127 F.3d 1314, 1325 (11th Cir. 1997) (internal quotation marks and citation omitted). Montenegro was asked if she traveled to the jail with Mr. Rabin after the mistrial to meet with Petitioner Sanchez. She answered unequivocally, "Yes, sir." Section 2255 *Hearing Transcript*, at pp. 108-9. However, the FDC Miami "Visiting History" for Petitioner while he was at the FDC in Miami does not contain Montenegro on its list of visitors. Therefore, Montenegro clearly related events that could not have occurred before her and her testimony was incredible as a matter of law. *See, Steele*, 178 F.3d at 1236. See Appendix VH

The fact that Montenegro's testimony contradicts Petitioner's is an announced basis for rejecting his testimony. *See, R & R,* at 5, fn 3; and 8, fn 5. Since Montenegro's testimony was incredible as a matter of law and Petitioner's testimony was supported by substantial evidence, there is no sufficient basis to completely disregard Petitioner's testimony concerning exactly what his attorneys communicated to him. This is particularly true because neither of Petitioner's trial counsel had any specific recollection of discussing the BOL of 38 and the adjustments. On the other hand, Petitioner had clear recollection of the same events.

Petitioner recalled Rabin visiting with him at the FDC, accompanied by an investigator, about three or four days after the mistrial in order to discuss a motion to dismiss the indictment. Mr. Rabin testified that he had no independent recollection of specific meetings with Petitioner. Section 2255 *Hearing Transcript* at pp. 79-80, 83-86. Although Petitioner did not correctly recall the exact date of the meeting, his Visiting History from the FDC is consistent with his testimony. It shows that Rabin and Salazar, the investigator, visited Petitioner on 14 July 1996. *Id* at pp. 2-16 *See Visiting History*. Petitioner also testified that co trial counsel Casabielle visited him at the FDC a few days after the (double jeopardy based motion) was filed in order to discuss the likelihood of success. *Hearing Transcript* at p. 24. Casabielle's recollection of the meeting was not very clear. Section 2255 *Hearing Transcript* at p. 94. Again, the Visiting History is consistent with Petitioner's testimony, even though Petitioner did not recall the date of the meeting with exactitude. Petitioner testified that he called Rabin's office on 27 July and

discussed a plea offer with Rabin. Petitioner did not fully understand the offer and asked Rabin to come to the jail to explain it. Rabin went to the FDC the following day with Casabielle to meet with Petitioner and explain the terms of the offer. *Hearing Transcript* at pp. 29-34. The Visiting History shows that both Casabielle and Rabin visited Petitioner on 26 July 1996.

The corroborating evidence further supports the application for certificate of appealability. Therefore, it was error to reject the detailed, and corroborated testimony of Petitioner in favor of vague recollections and statements premised upon the customs and practices of Petitioner's attorneys.

D. The Lower Court Did Not Apply the Proper Standard in Determining Whether the Advice in this Case Could Amount to Ineffective Assistance of Counsel.

"Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198, 203 (2001).

The Court in *Glover* held that the Seventh Circuit erred in attaching a new "significant" amount of jail time standard to the familiar prejudice prong of the *Strickland* test. *Glover*, 531 U.S. at 204. The Seventh Circuit affirmed a denial of a motion to correct sentence filed by a defendant who received a sentence that was excessive by between 6 to 21 months. Glover claimed it was ineffective assistance of counsel that caused him to receive the more

severe sentence, but the Seventh Circuit affirmed the denial of the motion because, in its view, 6 to 21 months was not significant enough to constitute prejudice in order to establish ineffective assistance. The Supreme Court rejected the reasoning noting: "We hold that the Seventh Circuit erred in engrafting this additional requirement onto the prejudice branch of the *Strickland* test." *Glover*, 531 U.S. at 204.

Petitioner bases his ineffective assistance of counsel claim on his counsels' failure to adequately inform him of the sentence he was facing if convicted after trial. Petitioner put forth evidence showing it should have been abundantly clear to his attorneys he would receive life in prison, not just the possibility, if he went to trial. Petitioner's trial attorneys claim they advised him he was facing 20 to 25 years based on his base offense level of 38. As a result, Petitioner was only able to weigh the plea offer against that far lesser sentence and not against a life sentence. Had Petitioner known that he was to receive a life sentence, he would have accepted the plea offer. Therefore, because of ineffective assistance of counsel, Petitioner received a life sentence instead of the 10 to 12½ years he would have served if he had accepted the plea offer.

The R & R errs in assuming that 20 to 25 year sentences are no different for a man in his mid-fifties. Since "any amount of actual jail time has Sixth Amendment significance," *Glover*, 531 U.S. at 203, it is wrong to assume that a man in his mid-fifties will not survive to be released after a 20 to 25 year sentence. According to *Glover*, a man in such a situation would not need to

survive the 20 to 25 year sentence by more than a day in order to have established prejudice.

E. Defense Counsel was Ineffective for Failure to Seek a Stay of the Second Trial In Order to File an Interlocutory Appeal of the District Court's Denial of the Double Jeopardy Based Dismissal Motion.

Defense counsel neither sought a stay before the district nor circuit courts nor did he discuss the issue with his client. An attorney must take every possible avenue to protect the client, even from himself. Here, Sanchez' decision to reject the government's plea offer, assuming he received competent advise, was wrong-headed. Defense counsel recognized that conviction would certainly ensue after retrial. Defense counsel also knew, or should have known, that timely application to the district court could postpone the proceedings for a period of time would allow a more reasoned resolution of plea proceedings. During the interim, trial counsel could make headway with his client by properly and fully confronting the life imprisonment alternative. He chose no [sic] to notwithstanding that a stay and interlocutory appeal on double jeopardy grounds are the only available means to forestall conviction. Trial counsel Rabin testified:

> Q. [Section 2255 Defense Counsel] isn't it a fair statement that you told Mr. Sanchez and his wife that they had a strong appeal on the double jeopardy issue?
>
> A. [Trial Counsel] on post trial, subsequently I did, yes, because that was the only issue.

Q. But you did tell him it was a strong appeal?

A. I told him it was a strong appeal based on that particular issue correct.

Q. So substantively, by the conclusion of the second trial, those facts and issues of law did not improve. Is that a fair statement?

A. Fair statement.

United States v. Sanchez, Transcripts of Section 2255 Proceedings, p 87.

A strong interlocutory double jeopardy based dismissal motion should have been filed. Unreasoned tactical strategy decisions can be construed as ineffective assistance of counsel as a matter of law. *Deluca v. Lord*, 77 F.3d 578, 590 (2nd Cir. 1996) (It was not a reasoned strategic decision for counsel to fail to pursue extreme emotional disturbance offense because there was a high probability that defense would have reduced defendant's liability form second degree murder to first degree manslaughter), *cert. denied*, 117 S.Ct. 83 (1996); *Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355, 1358 (4th Cir. 1992) (There was no cogent tactical consideration through counsel's failure to call alibi witnesses and counsel's mistake cannot be explained as "sound trial strategy"); *United States v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996) (counsel's failure to request jury instruction on self defense cannot be explained in a way as trial strategy). (Multiple further citations omitted).

Here, no proper label of "trial strategy" immunizes the attorney's decision from the Sixth Amendment challenges, in the context of failing to seek an interlocutory appeal and stay. See, *Martinez-Macias v. Collins*, 810

F.Supp. 782, 786 (W.D. TX 1991) *aff'd* 979 F.2d 1067 (5th Cir. 1992) (finding defense counsel strategy unreasonable, and thus grounds for ineffective counsel, where the law is not well researched); *U.S. v. Span*, 75 F.3d 1383, 1389, 1390 (9th Cir. 1996) ("The government characterizes defense counsel's conduct at trial as a strategic decision . . . [w]e have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client's only defense . . . ")

Delay was tantamount to victory since trial equated to defeat. Therefore counsel was required to discuss with Sanchez the advisability of seeking to stay the proceedings, rather than proceed forward to trial.

Proceeding to trial under these circumstances can be likened to failing to discuss with a Defendant the advisability of accepting or rejecting a plea bargain, particularly when trial is dispositive of conviction and a life sentence. See *Boria v. Keane, supra*. Prejudice results from the failure to provide an additional avenue beyond a sentence of life imprisonment and the failure to seek an additional opportunity to allow the Defendant time to either reach a plea agreement or allow a more reasonable explanation of the Sentencing Guidelines.

V. CONCLUSION

The Defendant respectfully prays that this Court enter an order expanding the Certificate of Appealability to include the two additional grounds described here.

Respectfully submitted,

By: /s/ Neil M. Schuster
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Fax: (305) 534-5470

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by fax and mail this 13 day of September, 2001 to Richard E. Byrne, AUSA, Office of the United States Attorney, 99 N.E. 4th Street Miami, FL 33166.

By: /s/ Neil M. Schuster
Neil M. Schuster

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-1445-EE

AUGUSTIN SANCHEZ,

Petitioner

V.

UNITED STATES OF AMERICA,

Appellant

APPENDIX

United States v. Sanchez, PSI, Excerpts,
Original and Revised

United States v. Sanchez, Judgment in a Criminal Case

FDC Miami Visiting History for Inmate Sanchez, Agustin
Reg. No 44031-004

Non-Guideline [ ]

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	)	**PRESENTENCE INVESTIGATION REPORT**
vs.	)	
AGUSTIN SANCHEZ	)	**Docket No. 95-421-CR-NESBITT**
	)	**Defendant No. 01**
	)	**Guideline Manual: 1995**

Prepared for: The Honorable Lenore C. Nesbitt, Judge
U. S. District Court

Prepared by: Joseph Garcia:gc
U. S. Probation Officer
Miami, Florida 33132
(305) 536-6756

Assistant U. S. Attorney	**Defense Counsel**
Richard E. Byrne	Samuel J. Rabin
99 NE 4th Street	799 Brickell Plaza
Miami, Florida 33132	Suite 606
(305) 536-4630	Miami, Florida 33131
	(305) 358-1064

Sentence Date: October 16, 1996 at 9:30 a.m.

Offense: Count One: Conspiracy to Import Marijuana, in violation of 21 U.S.C. § 963, a Class A Felony.

Penalty: Ten years to Life, $4,000,000 fine, Five years supervised release and $50 assessment.

Offense: Count Two: Importation of Marijuana, in violation of 21 U.S.C. § 952(a), a Class A Felony.

DEFENSE COUNSEL & PROSECUTORS
THIS IS A CONFIDENTIAL DOCUMENT PER [ILLEGIBLE]. DO NOT DISSEMINATE TO OTHER THAN THE DEFENDANT WITHOUT PRIOR COURT APPROVAL.

CONFIDENTIAL
PROPERTY OF U.S. COURTS.
SUBMITTED FOR OFFICIAL USE OF [ILLEGIBLE] PAROLE COMMISSION AND FEDERAL BUREAU OF PRISONS. TO BE [ILLEGIBLE] AFTER SUCH USE, OR UPON REQUEST [ILLEGIBLE] DISCLOSURE AUTHORIZED ONLY TO COMPLY WITH 18 USC 4208(b) (2).

* * *

31. Odilio Gonzalez is viewed as being third in command. He provided the use of his business for the storage and distribution point for the marijuana. He also acted as the intermediary between the CI's and undercover agent in Mobile, Alabama, and **Sanchez**.

Adjustment for Obstruction of Justice

32. The defendant's bond was revoked on May 7, 1996, after law enforcement authorities ascertained that the defendant was attempting to sell his home without the permission of the court and in direct violation of the conditions of his bond. Evidence indicated that the defendant had prepared a power of attorney allowing someone to act in his behalf in selling the residence, an indicator that the defendant was apparently quickly preparing to abscond from the Court's jurisdiction.

Adjustment for Acceptance of Responsibility

33. The defendant proceeded to trial in this matter and was convicted by jury as to Counts One, Two, Three and Five. As of the date of this report, the defendant has not submitted a statement regarding his involvement in the instant offense.

Offense Level Computation

34. Counts One, Two, Three and Five are grouped together pursuant to § 3D1.2(d), as the offense level is determined largely on the basis of the quantity of substance involved.

35. **Base Offense Level:** Pursuant to § 2D1.1, Application Note 10, where there are controlled substances of more than one type, each substance is to be converted into its marijuana equivalency. One gram of cocaine equals 200 grams of marijuana. The defendant is responsible for 573.2 kilograms of cocaine

(114,640 kilograms of marijuana). He is also responsible for 22,122 pounds of marijuana, or 10,034.6 kilograms of marijuana. Therefore, the total amount of marijuana for which the defendant is accountable is 124,674.6 kilograms.

36. Pursuant to § 2D1.1(a)(3) and (c), the base offense level for an offense involving in excess of 30,000 kilograms of marijuana is 38. **38**

37. **Specific Offense Characteristics:** A firearm was found by law enforcement officers at the warehouse where Odilio Gonzalez was arrested and where the marijuana was stored for distribution. Pursuant to § 2D1.1(b)(1), the offense level is increased by two levels. **+2**

38. **Victim-Related Adjustments:** None. **0**

39. **Adjustment for Role in the Offense:** The defendant is considered the leader of the drug smuggling organization. Pursuant to § 3B1.1(a), if the defendant was the leader of a criminal activity involving five or more participants or was otherwise extensive, the offense level is increased by four levels. **+4**

40. **Adjustment for Obstruction of Justice:** Pursuant to § 3C1.1, if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by two levels. **+2**

41. **Adjusted Offense Level (subtotal):** **46**

42. **Adjustment for Acceptance of Responsibility:** None. 0

43. **Total Offense Level:** **46**

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication(s)

44. None.

Adult Criminal Conviction(s)

45. None.

Criminal History Computation

46. The defendant has no criminal convictions and, therefore, he has zero criminal history points. According to the Sentencing Table (Chapter 5, Part A), zero criminal history points establish a criminal history category of I.

Other Criminal Conduct

47. None.

Pending Charges

48. None.

Other Arrests

49. None.

* * *

grant the motion, the defendant would still have equity of $285,000.00 in the property. The present mortgage requires monthly payments of $2,676.59. Based upon a fair market value of $545,000.000 and a first mortgage of $305,000.00, the property has an equity value of $240,000.00, fully attributable to the defendant as he is the singular owner of the property, acquired prior to his marriage. Court records also reveal that on March 21, 1991, the defendant quit-claim deeded his interest in other real property to Luisa Sanchez, whose relationship to the defendant is unknown to this officer.

77. (d) The defendant reported that he owed over $20,000.00 to various credit cards [sic] issuers. According to Equifax Credit Information Services report, the defendant owes approximately $40,000.00 to various credit card issuers. These debts are unsecured and do not attach any of the defendant's assets.

78. The defendant recently purchased a 1995 Toyota Camry which was financed with NationsBank. The vehicle is being operated by the defendant's daughter, Lissy Sanchez, who according to the defendant's wife is also making the monthly payments on the vehicle.

79. At this time, the defendant's wife is unemployed and with the defendant being incarcerated, he is unable to provide any income for the household. The family residence is for sale and should provide substantial proceeds for the defendant and his wife. Based on the expected sale of the home and the proceeds that the sale will generate, as well as the defendant's ability to make payments through the Inmate Financial Responsibility Program it appears that he could pay a fine.

PART D. SENTENCING OPTIONS

Custody

80. **Statutory Provisions:** The maximum term of imprisonment as to each of Counts One, Two, Three and Five is Life, pursuant to 21 U.S.C. §§ 841(a)(1) and 960(b)(1)(A). The mandatory minimum term of imprisonment as to each count is ten years.

81. **Guideline Provisions:** Based on a total offense level of 44 and a criminal history category of I, the guideline imprisonment sentence is Life.

Supervised Release

82. **Statutory Provisions:** A term of at least [Illegible] years supervised release is required as to each of Counts One, Two, Three and Five, pursuant to 21 U.S.C. §§ 841(a)(1) and 960(b)(1)(A).

PACTS # 42391

Non-Guideline [ ]

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	**PRESENTENCE INVESTIGATION REPORT**
vs.	******REVISED******
AGUSTIN SANCHEZ	**Docket No. 95-421-CR-NESBITT**
	Defendant No. 01
	Guideline Manual: 1995

Prepared for: The Honorable Lenore C. Nesbitt, Judge
U. S. District Court

Prepared by: Joseph Garcia:gc
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Penalty: Ten years to Life, $4,000,000 fine, Five years supervised release and $50 assessment.

Offense: Count Two: Importation of Marijuana, in violation of 21 U.S.C. § 952(a), a Class A Felony.

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32. The defendant's bond was revoked on May 7, 1996, after law enforcement authorities ascertained that the defendant was attempting to sell his home without the permission of the court and in direct violation of the conditions of his bond. Evidence indicated that the defendant had prepared a power of attorney allowing someone to act in his behalf in selling the residence, an indicator that the defendant was apparently quickly preparing to abscond from the Court's jurisdiction.

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37. **Specific Offense Characteristics:** None. **0**

38. **Victim-Related Adjustments:** None. **0**

39. **Adjustment for Role in the Offense:** The defendant is considered the leader of the drug smuggling organization. Pursuant to § 3B1.1(a), if the defendant was the leader of a criminal activity involving five or more participants or was otherwise extensive, the offense level is increased by four levels. **+4**

40. **Adjustment for Obstruction of Justice:** Pursuant to § 3C1.1, if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by two levels. **+2**

41. **Adjusted Offense Level (subtotal):** 44

42. **Adjustment for Acceptance of Responsibility:** None. 0

43. **Total Offense Level:** 44

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication(s)

44. None.

Adult Criminal Conviction(s)

45. None.

Criminal History Computation

46. The defendant has no criminal convictions and, therefore, he has zero criminal history points. According to the Sentencing Table (Chapter 5, Part A), zero criminal history points establish a criminal history category of I.

Other Criminal Conduct

47. None.

Pending Charges

48. None.

Other Arrests

49. None.

* * *

grant the motion, the defendant would still have equity of $285,000.00 in the property. The present mortgage requires monthly payments of $2,676.59. Based upon a fair market value of $545,000.000 and a first mortgage of $305,000.00, the property has an equity value of $240,000.00, fully attributable to the

defendant as he is the singular owner of the property, acquired prior to his marriage. Court records also reveal that on March 21, 1991, the defendant quit-claim deeded his interest in other real property to Luisa Sanchez, whose relationship to the defendant is unknown to this officer.

77. (d) The defendant reported that he owed over $20,000.00 to various credit cards [sic] issuers. According to Equifax Credit Information Services report, the defendant owes approximately $40,000.00 to various credit card issuers. These debts are unsecured and do not attach any of the defendant's assets.

78. The defendant recently purchased a 1995 Toyota Camry which was financed with NationsBank. The vehicle is being operated by the defendant's daughter, Lissy Sanchez, who according to the defendant's wife is also making the monthly payments on the vehicle.

79. At this time, the defendant's wife is unemployed and with the defendant being incarcerated, he is unable to provide any income for the household. The family residence is for sale and should provide substantial proceeds for the defendant and his wife. Based on the expected sale of the home and the proceeds that the sale will generate, as well as the defendant's ability to make payments through the Inmate Financial Responsibility Program it appears that he could pay a fine.

PART D. SENTENCING OPTIONS

Custody

80. **Statutory Provisions:** The maximum term of imprisonment as to each of Counts One, Two, Three and Five is Life, pursuant to 21 U.S.C. §§ 841(a)(1) and 960(b)(1)(A). The mandatory minimum term of imprisonment as to each count is ten years.

81. **Guideline Provisions:** Based on a total offense level of 44 and a criminal history category of I, the guideline imprisonment sentence is Life.

Supervised Release

82. **Statutory Provisions:** A term of at least [Illegible] years supervised release is required as to each of Counts One, Two, Three and Five, pursuant to 21 U.S.C. §§ 841(a)(1) and 960(b)(1)(A).

United States District Court

Southern District of Florida

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987)
v.	
AGUSTIN SANCHEZ	

Case Number:
1:95CR00421-002

(Filed Dec. 4, 1996)
Samuel Rabin, Manuel Casabielle, Esqs. Richard Byrne, AUSA
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[X] was found guilty on count(s) 1, 2, 3, & 5 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 963	Conspiracy to import marijuana	06/02/95	1
21 U.S.C. § 952(a)	Importation of marijuana	06/02/95	2
21 U.S.C. § 846	Conspiracy to possess with intent to distribute cocaine and marijuana	06/02/1995	3
21 U.S.C. § 841(a)(1)	Possess with intent to distribute marijuana	06/02/1995	5

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) 4

[X] Count(s) remaining are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
266-97-1420

Defendant's Date of Birth:
07/04/1943

Defendant's USM No.:
44031-004

Defendant's Residence Address:
[Illegible] 01 SW 58 St

Miami FL

Defendant's Mailing Address:
[Illegible] 01 SW 58 St

Miami FL

12/03/1996
Date of Imposition of Judgment

/s/ Lenore C. Nesbitt
Signature of Judicial Officer

Lenore C. Nesbitt
U.S. District Court
Name & Title of Judicial Officer

12-4-96
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of life.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ a.m/p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[ ] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 200.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement..... $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18

U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$	$	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than ____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (e.g. equal, weekly, monthly, quarterly) installments of $ _____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[X] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States [illegible], Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as [illegible] by the court, the probation officer, or the United States attorney.

DATE: 07-26-2000 FDC MIAMI PAGE: 1

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VISITING HISTORY FOR INMATE NAME:
SANCHEZ, AGUSTIN
REGISTER NUMBER: 44031-004
DATES: 05-03-1996 – 03-18-1997

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[Reproduced, *supra*, at pages J-6 – J-13]